DOCKET

No. 13-7120

Title:	Samuel James Johnson, Petitioner
	v.
	United States
Docketed:	October 30, 2013
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(12-3123)
Decision Date:	July 31, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 28 2013	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 29, 2013)
Nov 20 2013	Order extending time to file response to petition to and including December 30, 2013.
Dec 20 2013	Order further extending time to file response to petition to and including January 29, 2014.
Jan 24 2014	Order further extending time to file response to petition to and including February 28, 2014.
Feb 28 2014	Brief of respondent United States in opposition filed.
Mar 20 2014	DISTRIBUTED for Conference of April 4, 2014.
Apr 7 2014	DISTRIBUTED for Conference of April 18, 2014.
Apr 21 2014	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
May 16 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 26, 2014.
May 16 2014	The time to file respondent's brief on the merits is extended to and including August 18, 2014.
Jun 13 2014	Motion to dispense with printing the joint appendix filed by petitioner Samuel James Johnson.
Jun 26 2014	Brief of petitioner Samuel James Johnson filed.
Jun 30 2014	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jul 3 2014	Brief amici curiae of Gun Owners of America, Inc., et al. filed.
Aug 18 2014	Brief of respondent the United States filed.
Aug 25 2014	Brief amici curiae of Law Professors filed.
Aug 25 2014	Brief amici curiae of The Brady Center for Gun Violence, et al. filed.
Sep 4 2014	SET FOR ARGUMENT on Wednesday, November 5, 2014.
Sep 8 2014	Record requested from U.S.C.A. 8th Circuit.
Sep 15 2014	Record received from U.S.C.A. 8th Circuit. 1 Envelope
Sep 17 2014	Reply of petitioner Samuel James Johnson filed.
Sep 19 2014	CIRCULATED
Nov 5 2014	Argued. For petitioner: Katherine M. Menendez, Assistant Federal Defender,

	Minneapolis, Minn. For respondent: John F. Bash, Assistant to the Solicitor General, Department of Justice, Washington, D.C.
Jan 9 2015	This case is restored to the calendar for reargument. The parties are directed to file supplemental briefs addressing the following question: "Whether the residual clause in the Armed Career Criminal Act of 1984, 18 U. S. C. 924(e)(2)(B)(ii), is unconstitutionally vague." The supplemental brief of petitioner is due on or before Wednesday, February 18, 2015. The supplemental brief of the United States is due on or before Friday, March 20, 2015. The reply brief, if any, is due on or before Friday, April 10, 2015. The time to file amicus curiae briefs is as provided for by Rule 37.3(a). The word limits and cover colors for the briefs should correspond to the provisions of Rule 33.1(g) pertaining to briefs on the merits rather than to the provision pertaining to supplemental briefs. The case will be set for oral argument during the April 2015 argument session.
Feb 18 2015	Supplemental brief of petitioner Samuel James Johnson filed.
Feb 25 2015	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Mar 6 2015	SET FOR ARGUMENT ON Monday, April 20, 2015
Mar 16 2015	CIRCULATED.
Mar 17 2015	Record requested from U.S.C.A. 8th Circuit.
Mar 20 2015	Supplemental brief of respondent United States filed (Reprinted). (Distributed)
Mar 25 2015	Record received from U.S.C.A. 8th Circuit. (1-Envelope)
Mar 25 2015	Record received from U.S.D.C. District of Minnesota. The record is electronic, also 1 envelope (SEALED).
Apr 10 2015	Supplemental reply brief of petitioner Samuel James Johnson filed. (Distributed)
Apr 20 2015	Reargued. For petitioner: Katherine M. Menendez, Assistant Federal Defender, Minneapolis, Minn. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.
Jun 26 2015	Judgment REVERSED and case REMANDED. Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Kennedy, J., and Thomas, J., filed opinions concurring the judgment. Alito, J., filed a dissenting opinion.
Jul 28 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

No. 13-7120

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2013

ORIGINAL

SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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10

QUESTION PRESENTED FOR REVIEW

I.

WHETHER MERE POSSESSION OF A SHORT-BARRELED SHOTGUN SHOULD BE TREATED AS A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT?

INTRODUCTION

This case presents an important issue concerning proper application of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). Lower federal courts are deeply divided about whether the mere possession of a "sawed-off" shotgun is a "violent felony" triggering application of the ACCA. Despite this Court's recent jurisprudence narrowing the application of the ACCA's residual clause, the Eighth Circuit Court of Appeals has repeatedly ruled that such possession is violent. However, several other Courts of Appeals have reached the opposite conclusion in the last few years. Still other courts have declined to revisit the issue in the wake of this Court's relevant rulings.

Petitioner Samuel Johnson urges the Court to grant certiorari and address whether possession of a gun with a shortened barrel in fact "involves conduct that presents a serious potential risk of physical injury to another..." Not only is the issue one of importance in the context of short-barreled shotguns, but this case gives the Court a needed opportunity again to clarify proper application of the residual clause.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2013

SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Samuel James Johnson, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 31, 2013.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not reported in the Federal Reporter, but can be found at 2013 WL3924353, and is reprinted in the appendix hereto, p. 1a, infra.

The judgment of the United States District Court for the District of Minnesota (Kyle, J.) has not been reported. It is reprinted in the appendix hereto, p. a, infra.

JURISDICTION

Petitioner Samuel James Johnson entered a plea of guilty to violation of Title 18, United States Code, Section § 922(g). He was sentenced to 180 months imprisonment by the Honorable Richard H. Kyle, Senior United States District Judge for the District of Minnesota.

The United States Court of Appeals for the Eighth Circuit affirmed in an unpublished per curiam opinion filed on July 31, 2013. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 924(e)(1) and (e)(2)(B):

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)...

(e)(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that —

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

Minnesota Statute § 609.67

Sub. 2. Acts prohibited. Except as otherwise provided herein, whoever owns, possesses, or operates a ... short-barreled shotgun may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

STATEMENT OF THE CASE

1. On June 6, 2012, Samuel Johnson pleaded guilty to one count of being a felon in possession of a firearm pursuant to 18 U.S.C. § 922(g)(1). In his written plea agreement, Mr. Johnson acknowledged that the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), might apply, raising the available penalties from no more than ten years in prison to a term of fifteen years to life imprisonment. However, Mr. Johnson reserved the right to challenge the application of the ACCA.

2. The presentence investigation report (PSR) concluded that Mr. Johnson's criminal history contained three prior convictions which qualified as "violent felonies" under 18 U.S.C. § 924(e)(2)(B). Mr. Johnson had two convictions for simple robbery which are not at issue in the instant petition. Mr. Johnson's criminal history also contained a 2007 conviction for possession of a short-barreled shotgun in violation of Minnesota Statute § 609.67, sub. 2.

3. Mr. Johnson objected to his treatment as an Armed Career Criminal in his sentencing filings to the district court. Relevant to the present petition, he argued that mere possession of a short-barreled shotgun should not count as a violent felony. If that conviction was not treated as an ACCA predicate, Mr. Johnson would not be subject to treatment under the statute. However, Mr. Johnson acknowledged that the Eighth Circuit had previously ruled against his claim in previous decisions.

4. At sentencing, the district court rejected Mr. Johnson's challenge and ruled that all three of the prior convictions and relied upon by the government to enhance his sentence were in fact violent felonies within the meaning of the Armed Career Criminal Act. The district court sentenced Mr. Johnson to 180 months in prison, the statutory mandatory minimum, nothing that the court would have imposed a lower sentence.

5. Mr. Johnson appealed his sentence to the Eighth Circuit Court of Appeals. Mr. Johnson argued, in relevant part, that his prior conviction for possession of a short-barreled shotgun is not a "violent felony" under the ACCA. However, he acknowledged the court's prior contrary rulings from *United States v. Vincent*, 575 F.3d 820 (8th Cir. 2009), and *United States v. Lillard*, 685 F.3d 773 (8th Cir. 2012).

6. On July 31, 2013, the Eighth Circuit issued a per curiam opinion affirming Mr. Johnson's fifteen year sentence. *United States v. Johnson*, WL3924353. The court noted that it had already ruled on the issue, and that possession of a sawed-off shotgun qualified as a violent felony under the "residual clause" to the ACCA.

> Our Circuit addressed the sentencing implications of possessing a short-barreled shotgun in *United States v. Lillard*:
>
> > Possession of a short shotgun presents a serious risk of physical injury to another because it is roughly similar to the listed offenses within the ACCA, both in kind as well as the degree of risk for harm posed. Lillard's possession of a short shotgun is a violent felony.
>
> Johnson's offense is not meaningfully distinguishable from the one

in *Lillard*.

Johnson, slip op. at 6 (quoting *United States v. Lillard*, 685 F.3d 774, 777 (8th Cir. 2012)).

REASONS FOR GRANTING THE WRIT

This Court has addressed the residual clause of the Armed Career Criminal Act four times in recent years. *See Sykes v. United States*, __ U.S. __, 131 S. Ct. 2267, (2011); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007). Despite such close attention from this Court, lower courts' interpretations of the residual clause vary widely, resulting in disparate treatment of criminal defendants nationwide. Two men incarcerated in the same federal prison for the same offense, with identical offenses in their criminal history, face radically different sentences depending on the law in the Circuit where they were prosecuted. The treatment of possession of a shortened shotgun exemplifies this unfair disparity.

I.

THE DECISION BELOW PERPETUATES A CLEAR SPLIT AMONG THE CIRCUIT COURTS.

In the *Johnson* case, and its antecedents *Lillard* and *Vincent*, the Eighth Circuit furthered a clear and deep split among the Circuit Courts of Appeals. The Fourth, Sixth, Seventh and Eleventh Circuits have all ruled that possession of a sawed-off or short-barrel weapon is not a violent felony within the meaning of the residual clause of § 924(e). *See United States v. Haste*, 292 Fed. Appx. 249 (4th Cir. 2008)(unpub'd); *United States v. Ross*, 416 Fed. Appx. 289 (4th Cir. 2011)(unpub'd); *United States v. Amos*, 501 F.3d 525 (6th Cir. 2007); *United States v. Hawkins*, 554 F.3d 615 (6th Cir. 2009); *United States v. Miller*, 721 F.3d 435 (7th Cir. 2013); *United States v. McGill*, 618 F. 3d 1273, 1279 (11th Cir.

2010). Two other Circuits have not directly ruled on the issue, but other decisions suggest that they would join their peers that conclude that such an offense is not a violent felony. *See United States v. Crampton*, 519 F.3d 893, 898 (9th Cir. 2008), *vacated* by 555 U.S. 113 (2009) (remanded by Supreme Court to reconsider holding that possession of sawed-off shotgun is violent felony in light of *Begay*); *United States v. Serafin*, 562 F.3d 1105 (10th Cir. 2009)(finding sawed off shotgun possession not a crime of violence under related provision of § 924(c)).

Only the Eighth Circuit has addressed the issue since this Court's decisions from *Begay*, *Chambers and Sykes* and still concluded that possession of a short-barreled shotgun is a violent felony. This decision joined the First Circuit, which ruled in 1998 in *United States v. Fortes* that possession of such a weapon counts as an ACCA predicate. 141 F.3d 1, 6-8 (1st Cir. 1998). Although the First Circuit reaffirmed this holding in 2006, it has not assessed it in the wake of *Begay* and its progeny. *See United States v. Bishop*, 453 F.3d 30, 31 (1st Cir. 2006).

In *United States v. Miller*, decided one month prior to the *Johnson* decision, the Seventh Circuit concluded that violation of Wisconsin's statute prohibiting possession of a shotgun with a short barrel is not a violent felony, and conducted a searching analysis in reaching that conclusion. *Miller*, 721 F.3d 435, 439-40 (7th Cir. 2013). Following an examination of the many ways in which the Wisconsin statute could be violated by "passive possession in which the weapon is not exposed to others," the court found that "the risk of physical injury to another presented by the mere possession of a short-barreled shotgun is not in the same

league as the risks presented by the offenses of burglary, arson, extortion, or crimes involving the use of explosives." *Miller*, 721 F.3d at 440. The *Miller* court specifically analyzed and rejected the Eighth Circuit's decisions from *Vincent* and *Lillard,* and noted it would be following the contrary holdings of the Sixth and Eleventh Circuits.

> We simply don't think that the latent risks inherent in the offense of possessing a short-barreled shotgun are sufficient to qualify for the residual clause when the crimes from which we are instructed to guide our determination -- burglary, arson, extortion, and crimes involving the *use* of explosives -- all are inherently risky without that extra step required for the risk to manifest.

Miller, 721 F.3d at 443.

The Sixth Circuit reached the same conclusion as the Seventh, though years before. In *United States v. Amos*, 501 F.3d 524 (6th Cir. 2007), the court found that violation of a Tennessee statute criminalizing mere possession of a sawed-off shotgun was not a violent felony under the ACCA. The *Amos* court noted that possession does not "fit well with the more active crimes included in the statute." *Amos,* 501 F.3d at 528. The court also found a difference between crimes that carry a risk of violence and those that carry a "future" risk. *Amos,* 501 F.3d at 528-29. *See also United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010)(holding that violation of Florida statute prohibiting possession of a short-barreled shotgun was not a violent felony under the ACCA).

In total, four Circuits have expressly held that possession of a short-barreled shotgun is not a violent felony, two Circuits would likely follow suit based upon

related precedent, and only two persist in concluding that it is. Such a clear split among the Circuit Courts can only be settled by this Court.

II.

THIS CASE PRESENTS AN IDEAL VEHICLE FOR THE COURT TO DECIDE WHETHER MERE POSSESSION OF A SHORTENED FIREARM SHOULD COUNT AS A VIOLENT FELONY.

Samuel Johnson's petition provides an ideal vehicle for this Court to determine whether possession of a short-barreled shotgun should count as a crime of violence. First, the issue, is squarely presented. Aside from the sawed-off shotgun conviction, Mr. Johnson has only two prior offenses which could count as predicate offenses under the ACCA. Indeed, the district court expressed his belief that the fifteen year sentence required by the ACCA was much higher than it would otherwise impose. (Sent. p. 22) If, as the Eighth Circuit concluded, possession of a sawed-off shotgun is a violent felony under the residual clause, Mr. Johnson remains an Armed Career Criminal and his fifteen year sentence holds. If this Court agrees with the Seventh Circuit and several others that it is not a violent felony, on the other hand, Mr. Johnson was not properly sentenced under the enhanced penalties of the ACCA and remand is required.

Second, although the specific language of underlying statutes is essential to this Court's violent felony analysis, the statute at issue in Mr. Johnson's case is essentially indistinguishable from the statutes at issue in the other cases. The Minnesota statute criminalizes "whoever owns, possesses, or operates..." a short-barreled shotgun. Minn Statute § 609.67, sub. 2. The Wisconsin statute at issue in

Miller provides that "[n]o person may sell or offer to sell, transport, purchase, possess or go armed with a short-barreled shotgun or short-barreled rifle." Wisc. Stat. § 941.28(2). The North Carolina statute considered in *Haste* also prohibits simple possession of shotguns with barrels less than 18 inches. These statutes are all identical in criminalizing the simple possession of a short-barreled shotgun with no additional requirement that the gun be used in any way. By accepting review of Mr. Johnson's case, the Court can definitely answer whether mere possession of such a weapon is a violent felony.

III.

THE EIGHTH CIRCUIT'S DECISION BELOW INCORRECTLY APPLIES THIS COURT'S PRECEDENT.

Finally, Mr. Johnson urges the Court grant certiorari because the Eighth Circuit's position on this issue is simply incorrect. Although the test for whether a prior conviction counts as a violent felony under the residual clause has many facets, the central question in the present case seems to be pointed to by this Court's most recent decision on the issue, *Sykes v. United States*, ___ U.S. ___, 131 S. Ct. 2267 (2011). A court must decide that a prior conviction presents a "serious potential risk of physical injury," similar to the degree and types of risks presented by the listed offenses of "burglary, arson, extortion, and crimes involving the *use* of explosives."

Additionally, though parts of the *Begay* analysis have perhaps been somewhat sidelined by the *Sykes* holding, a court must still determine whether an

offense involves conduct that is "purposeful, violent and aggressive," before the residual clause is triggered. *Begay*, 553 U.S. at 145.

Under both lines of analysis, the simple possession of a short-barreled shotgun is not a violent felony. Most obviously, the risk presented by possession of such a weapon is much less than the offenses's closest analog among the enumerated offenses, "*use* of explosives." Indeed, both *Miller* and *McGill* noted that Congress included only "use of explosives" offenses in the statute's list, not basic possession, when they concluded that basic possession of a short-barreled weapon is not a violent felony. *Miller*, 721 F.3d at 441; *McGill*, 618 F.3d at 277 (11th Cir. 2010).

Moreover, in an ordinary possession of a short-barreled weapon case, such as the underlying offense in this case, the weapon is possessed and nothing more. Mr. Johnson's possession of a sawed-off shotgun conviction, for instance, involved the discovery of the prohibited weapon in a bag in the backseat of a car in which he was a front seat passenger. In *Miller*, the court collected cases prosecuted under the sawed-off shotgun statute and noted that they often involve "a passive possession in which the weapon is not exposed to others." *Miller*, 721 F.3d at 439-40 (referencing cases including possession of the weapon behind closed pantry doors, in a closet, and locked in a car trunk).

The Eighth Circuit's conclusion that possession of a shortened long gun is a violent felony because of the more dangerous nature of the weapon itself, *see*

United States v. Vincent, 575 F.3d 820, 825-26 (8th Cir. 2009), erroneously disregards the analysis required by *Begay* and its progeny.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Eighth Circuit.

Dated: October 28, 2013

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APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 12-3123

United States of America

Plaintiff - Appellee

v.

Samuel James Johnson

Defendant - Appellant

Appeal from United States District Court
for the District of Minnesota - St. Paul

Submitted: May 13, 2013
Filed: July 31, 2013
[Unpublished]

Before WOLLMAN, MURPHY, and SMITH, Circuit Judges.

PER CURIAM.

Samuel James Johnson pleaded guilty to being an armed career criminal in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The district

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court[1] designated three of Johnson's prior convictions—attempted simple robbery, simple robbery, and possession of a short-barreled shotgun—as violent felonies. The court then found Johnson to be an armed career criminal under the Armed Career Criminal Act (ACCA) and sentenced him to the mandatory minimum of 180 months' imprisonment. Johnson appeals his designation as an armed career criminal, arguing that his convictions for attempted simple robbery and possession of a short-barreled shotgun were not violent felonies under the ACCA. Johnson also argues that the ACCA is unconstitutionally vague. We affirm.

I. *Background*

In 2010, the FBI began investigating Johnson's involvement in an organization called the National Social Movement. Johnson subsequently left the National Social Movement and founded the Aryan Liberation Movement, where he planned to counterfeit United States currency to fund its activities. On November 4, 2010, Johnson disclosed to undercover FBI agents that he manufactured napalm, silencers, and other explosives for the Aryan Liberation Movement. That same day, he showed an undercover officer his AK-47 rifle. Additionally, he showed the undercover officer a large cache of ammunition containing approximately 1,100 rounds. Then, in December 2010, he possessed a .22 caliber semi-automatic assault rifle and a .45 caliber semi-automatic handgun.

Authorities arrested Johnson in April 2012 when he attended a meeting with his probation officer. Johnson admitted at that time that he possessed an AK-47 rifle and a .22 caliber semi-automatic assault rifle.

A grand jury charged Johnson in a six-count indictment with being an armed career criminal in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and

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[1]The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

APPENDIX A-2

924(e) (Counts 1, 3, 5, and 6)[2]; and being a felon in possession of ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (Counts 2 and 4.) Johnson agreed to plead guilty to Count 3 in exchange for the government dismissing the remaining counts. The plea agreement, in its criminal history section, stated that Johnson

> qualifies as an "Armed Career Criminal" and would therefore be subject to a mandatory minimum 15 year term of imprisonment pursuant to Title 18 Section 924(e). The defendant reserves the right to further investigate the defendant's prior convictions and challenge the applicability of the ACCA based upon a review of the underlying documents relating to his conviction.

The presentence investigation report (PSR) identified three prior violent felonies. Johnson's first violent felony was a conviction for attempted simple robbery in Minnesota. In 1999, Johnson put a gun to the victim's head and demanded money. Unbeknownst to the victim, the handgun was a BB gun. Johnson's second prior violent felony was a simple robbery. In 2007, Johnson pleaded guilty to robbing an individual at gunpoint in a parking lot. His third prior violent felony conviction came later that year when Johnson was convicted of possessing a short-barreled shotgun during a drug sale.

Johnson objected to the PSR's designation of his convictions for short-barreled shotgun possession, simple robbery, and attempted simple robbery as violent felonies. Johnson also argued that the district court should use the categorical approach to determine that attempted simple robbery was not a violent felony. Johnson further argued that the ACCA was unconstitutionally vague. In response, the government averred that Eighth Circuit precedent establishes that possession of a short-barreled

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[2]Johnson's possession as a convicted felon of the AK-47 rifle on November 4, 2010, became Count 3 of the indictment.

APPENDIX A-3

shotgun and attempted simple robbery are both violent felonies and that the ACCA is not unconstitutionally vague.

The PSR calculated a base offense level of 24 for Johnson's violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1) subsequent to two felony convictions of a crime of violence. U.S.S.G. § 2K2.1(a)(2). The PSR added two offense levels under U.S.S.G. § 2K2.1(b)(1)(A) for possessing more than three but less than seven firearms and added four offense levels under U.S.S.G. § 2K2.1(b)(6)(B) for possessing the firearm in connection with another felony offense. The PSR determined that Johnson's three violent felonies qualified him as an Armed Career Criminal, and it increased his offense level to 33 under U.S.S.G. § 4B1.4(b)(3)(B). Finally, the PSR reduced the total offense level to 30 based on Johnson's acceptance of responsibility. Johnson received three criminal history points, one for each of the three prior felonies at issue in this appeal. Two additional points were added because Johnson committed the instant offense while under a criminal justice sentence. Johnson's total criminal history score of 5 in conjunction with his status as an armed career criminal resulted in a criminal history category of IV.

The district court followed the recommendation of the PSR and found Johnson to have three prior felony convictions; therefore, it determined that Johnson was an armed career criminal under 18 U.S.C. § 924(e). The district court sentenced Johnson to 180 months' imprisonment, the ACCA mandatory minimum, and five years of supervised release.

II. *Discussion*

On appeal, Johnson argues that (1) his 1999 conviction for attempted simple robbery and his 2007 conviction for possession of a short-barreled shotgun should not be considered violent felonies for the purpose of the ACCA and (2) the ACCA is unconstitutionally vague.

APPENDIX A-4

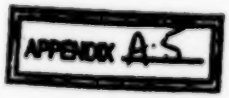
A. *Violent Felonies Under the ACCA*

"'We review *de novo* a district court's determination that a defendant's prior conviction constitutes a violent felony for purposes of § 924(e).'" *United States v. Soileau*, 686 F.3d 861, 864 (8th Cir. 2012) (quoting *United States v. Boaz*, 558 F.3d 800, 806 (8th Cir. 2009)). Under 18 U.S.C. § 922(g)(1),

> (g) [i]t shall be unlawful for any person—
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year
> > . . .
>
> * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Furthermore, any individual "who violates section 922(g)(1)" and who "has three previous convictions . . . for a violent felony or a serious drug offense . . . shall be . . . imprisoned not less than fifteen years." 18 U.S.C. § 924(e)(1). Finally, according to § 924(e)(2)(B),

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or



> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

Our circuit addressed the sentencing implications of possessing a short-barreled shotgun in *United States v. Lillard*:

> Possession of a short shotgun presents a serious potential risk of physical injury to another because it is roughly similar to the listed offenses within the ACCA, both in kind as well as the degree of risk for harm posed. Lillard's possession of a short shotgun is a violent felony.

685 F.3d 774, 777 (8th Cir. 2012). Johnson's offense is not meaningfully distinguishable from the one in *Lillard*. The district court did not err by treating Johnson's possession of a short-barreled shotgun conviction as violent felony.

Similarly, the district court also properly considered Johnson's attempted simple robbery conviction to be a violent felony. In a case involving the Arkansas robbery statute, which is quite similar to the Minnesota robbery statute, we concluded that the offense of attempted robbery was a violent felony for purposes of the ACCA.

> The Arkansas robbery statute provides "a person commits robbery if, with the purpose of committing a felony or misdemeanor theft . . . the person employs or threatens to immediately employ physical force upon another person." Ark. Code Ann. § 5-12-102(a). By definition, robbery in Arkansas qualifies as a crime of violence under § 4B1.2(a)(1). An attempt to commit an Arkansas robbery automatically qualifies as a crime of violence under the binding commentary to § 4B1.2. Thus, [the defendant's] Arkansas state conviction for attempted robbery qualifies as a crime of violence under § 4B1.1, and the district court did not err when it applied the career offender provision.

United States v. Sawyer, 588 F.3d 548, 556 (8th Cir. 2009).

APPENDIX A-16

The Minnesota robbery statute phrase "uses or threatens the imminent use of force against any person," Minn. Stat. § 609.24, is almost identical in meaning to the Arkansas statute's phrase "employs or threatens to immediately employ physical force upon another person," Ark. Code Ann. § 5-12-102(a). *See Sawyer*, 588 F.3d at 556. Consequently, the holding in *Sawyer* that attempted robbery is a violent felony under the ACCA applies to Johnson's attempted simple robbery in Minnesota. *See id.*

Since Johnson's three prior convictions—attempted simple robbery, simple robbery, and being a felon in possession of a short barreled shotgun—are violent felonies under the ACCA, the district court properly classified Johnson as an armed career criminal under § 924(e).

B. *Constitutionality of the ACCA*

Johnson argues that the ACCA is unconstitutionally vague and asks this court to adopt Justice Scalia's dissenting view. *See United States v. Sykes*, 131 S. Ct. 2267, 2284–89 (2011) (Scalia, J., dissenting); *James v. United States*, 550 U.S. 192, 215–31 (2007) (Scalia, J., dissenting).

The Supreme Court and this circuit have upheld the constitutional validity of § 924(e) against challenges that it was unconstitutionally vague. Johnson's argument does not meaningfully differ from earlier attempts. We need not discuss the matter further for purposes of appeal. *See James*, 550 U.S. at 210 n.6; *United States v. Hudson*, 414 F.3d 931, 936 (8th Cir. 2005).

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

APPENDIX A-7

United States District Court

District of Minnesota

UNITED STATES OF AMERICA
v.
SAMUEL JAMES JOHNSON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: CR. 12-104 RHK/FLN
USM Number: 16481-041
Social Security Number: 1058
Date of Birth: 1980

Douglas Olson
Defendant's Attorney

THE DEFENDANT:

[x] pleaded guilty to count(s): 3.
[] pleaded nolo contendere to counts(s) which was accepted by the court.
[] was found guilty on count(s) after a plea of not guilty.
The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 922(g)(1)and 924(e)(1)	Armed career criminal in possession of firearm	November 4, 2010	3

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on counts(s) .
[x] Count(s) 1,2,4-6 (is)(are) dismissed on the motion of the United States.
$100 Special Assessment due immediately.
It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in the economic circumstances.

September 5, 2012
Date of Imposition of Judgment

s/ Richard H. Kyle
Signature of Judge

RICHARD H. KYLE, United States District Judge
Name & Title of Judge

September 5, 2012
Date

APPENDIX B-1

AO 245B (Rev. 11/11) Sheet 2 - Imprisonment

DEFENDANT: SAMUEL JAMES JOHNSON
CASE NUMBER: CR. 12-104 RHK/FLN

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **180 months**.

[x] The court makes the following recommendations to the Bureau of Prisons:
confinement be at the Medium Security Facility, Terre Haute, Indiana

[x] The defendant is remanded to the custody of the United States Marshal.

[] The defendant shall surrender to the United States Marshal for this district.
[] at on .
[] as notified by the United States Marshal.

[] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[] before on .
[] as notified by the United States Marshal.
[] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

a _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

APPENDIX B-2

DEFENDANT: SAMUEL JAMES JOHNSON
CASE NUMBER: CR. 12-104 RHK/FLN

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this Judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

APPENDIX E-3

DEFENDANT: SAMUEL JAMES JOHNSON
CASE NUMBER: CR. 12-104 RHK/FLN

SPECIAL CONDITIONS OF SUPERVISION

a The defendant shall not commit any crimes, federal, state, or local.

b The defendant shall abide by the standard conditions of supervised release recommended by the Sentencing Commission.

c The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

d Defendant shall submit to substance abuse testing as approved and directed by the probation officer.

APPENDIX B-4

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2013

No. _____

SAMUEL JAMES JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

The undersigned hereby certifies that she is an employee of the Office of the Federal Defender and is a person of such age and discretion as to be competent to serve papers.

That on October 28, 2013, she served two copies of the attached:

Certiorari Petition
Motion to Proceed In Forma Pauperis

on the persons hereinafter named, at the places and addresses stated below, which are the last known addresses, by placing said documents in a authorized receptacle for United States Mail with first class postage prepaid.

Donald B. Verrilli, Jr.
Solicitor General
U.S. Department of Justice
Room 5614
950 Pennsylvania Ave NW
Washington, DC 20530-0001

Jeffrey Paulsen
Assistant U.S. Attorney
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Samuel James Johnson
Reg. No. 16484-041
FCI Memphis
P.O. Box 34550
Memphis, TN 38134

s/ Wendi Tilden

OPPOSITION BRIEF

ORIGINAL

No. 13-7120

Supreme Court, U.S.
FILED
FEB 28 2014
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL JAMES JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

MYTHILI RAMAN
Acting Assistant Attorney General

JAMES I. PEARCE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's prior felony conviction under Minnesota law for possession of a short-barreled shotgun is a "violent felony" under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

IN THE SUPREME COURT OF THE UNITED STATES

No. 13-7120

SAMUEL JAMES JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is not published in the Federal Reporter but is reprinted in 526 Fed. Appx. 708.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2013. The petition for a writ of certiorari was filed on October 28, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Minnesota, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 180 months of imprisonment under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A7.

1. Petitioner came to the FBI's attention in 2010 through his involvement with an organization called the National Socialist Movement, which advocates white supremacist views. Pet. App. A2; Revised Presentence Investigation Report (PSR) ¶ 5. In June 2010, petitioner left the National Socialist Movement to found the Aryan Liberation Movement, which he planned to support by counterfeiting United States currency. Pet. App. A2; PSR ¶¶ 6, 11. Throughout 2010, a confidential source and an undercover FBI agent were in regular contact with petitioner. PSR ¶¶ 5-6.

In November 2010, petitioner (who was a convicted felon) revealed to the confidential source and undercover agent that he had manufactured napalm, other explosives, and silencers for the Aryan Liberation Movement. Pet. App. A2; PSR ¶ 9. Petitioner also showed the undercover officer his AK-47 rifle and a large

cache of ammunition. Ibid. In December 2010, petitioner acquired a .22 caliber semiautomatic assault rifle and a .45 caliber semiautomatic handgun. Pet. App. A2; PSR ¶ 10. Throughout 2011, petitioner's comments about using violence to advance his cause escalated. PSR ¶ 15. Petitioner discussed various attacks he might plan on targets in Minnesota, including an attack on the Mexican consulate in St. Paul, Minnesota, on May 1, 2012. PSR ¶ 16.

In April 2012, law enforcement authorities arrested petitioner. Pet. App. A2; PSR ¶ 17. At the time of his arrest, petitioner admitted that he possessed an AK-47 rifle and a .22 caliber semiautomatic handgun. Ibid.

2. A grand jury in the United States District Court for the District of Minnesota returned an indictment charging petitioner with four counts of possession of a firearm by a convicted felon and two counts of possession of ammunition by a convicted felon, all in violation of 18 U.S.C. 922(g)(1). Indictment 1-6. The government contended that the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(1), applies to petitioner. The ACCA provides for a mandatory minimum sentence of 15 years of imprisonment for any defendant convicted of being a felon in possession of a firearm who has "three previous convictions * * * for a violent felony or a serious drug offense." The ACCA defines a "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year * * * that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The government contended that petitioner has at least three prior convictions that qualify as "violent felonies." Indictment 1-6; see PSR ¶ 34.

Petitioner pleaded guilty to one count of possession of a firearm by a convicted felon in exchange for the government dismissing the other counts of the indictment. Pet. App. A3. In his plea agreement, petitioner reserved the right to "challenge the applicability of the ACCA." Ibid. (quoting plea agreement).

At sentencing, the district court concluded that three of petitioner's prior Minnesota convictions -- for robbery, attempted robbery, and possession of a short-barreled shotgun -- qualify as violent felonies for ACCA purposes. See Pet. App. A4. The court therefore sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Id. at B2-B3.

3. The court of appeals affirmed in an unpublished, non-precedential opinion. Pet. App. A1-A7. As relevant here, the

court rejected petitioner's argument that possession of a short-barreled shotgun is not a "violent felony" under the ACCA. Id. at A5-A6. Relying on a prior decision, the court explained that possession of a short-barreled shotgun qualifies as a "violent felony" under the residual clause in 18 U.S.C. 924(e)(2)(B)(ii) because it "presents a serious potential risk of physical injury to another because it is roughly similar to the listed offenses within the ACCA, both in kind as well as the degree of risk for harm posed." Pet. App. A6 (quoting United States v. Lillard, 685 F.3d 773, 777 (8th Cir. 2012), cert. denied, 133 S. Ct. 1242 (2013)).[1]

ARGUMENT

Petitioner contends (Pet. 8-14) that his prior Minnesota conviction for possession of a short-barreled shotgun is not a "violent felony" under the ACCA's residual clause, 18 U.S.C. 924(e)(2)(B)(ii). The court of appeals correctly rejected that contention, and its decision is consistent with recent decisions of this Court interpreting the ACCA's residual clause. The decisions on which petitioner relies predate this Court's intervening decision in Sykes v. United States, 131 S. Ct. 2267 (2011), or are factually distinguishable, and they do not

[1] The court of appeals also rejected petitioner's arguments that his conviction for attempted robbery was not a violent felony and that the ACCA is unconstitutionally vague. Pet. App. A6-A7. Petitioner does not renew those arguments before this Court.

present any circuit conflict warranting this Court's review. This Court recently has denied review of the question presented in several cases (including the decision upon which the court of appeals relied),[2] and the same result is appropriate here.

1. The court of appeals correctly held that petitioner's prior Minnesota felony conviction for possession of a short-barreled shotgun qualifies as a "violent felony" under the ACCA's residual clause. In Sykes, this Court held that a prior felony conviction under Indiana law for vehicular flight from a law enforcement officer is a "violent felony" under the ACCA's residual clause because vehicular flight categorically "presents a serious potential risk of physical injury to another." 131 S. Ct. at 2273. The Court rejected the defendant's argument that Begay v. United States, 553 U.S. 137 (2008), and Chambers v. United States, 555 U.S. 122 (2009), "require ACCA predicates to be purposeful, violent, and aggressive in ways that vehicle flight is not." 131 S. Ct. at 2275. The Court held that, "[i]n general, levels of risk divide crimes that qualify from those that do not," and so an inquiry into "risk levels provide[s] a categorical and manageable standard that suffices to resolve the case." Id. at 2275-2276. The Sykes Court distinguished Begay

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[2] See Lillard v. United States, 133 S. Ct. 1242 (2013) (No. 12-6800) (relied upon by court of appeals below); Strother v. United States, 133 S. Ct. 148 (2012) (No. 11-10371); Vincent v. United States, 560 U.S. 927 (2010) (No. 09-8320).

as "involv[ing] a crime akin to strict liability, negligence, and recklessness crimes." Id. at 2276. Outside of that context, the Sykes Court explained, "[i]n many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk," and so focus on levels of risk is appropriate. Id. at 2275; id. at 2275-2276.

As in Sykes, the crime at issue involves knowing or intentional conduct. The Minnesota statute of conviction, Minn. Stat. Ann. § 609.67(2), prohibits "own[ing], possess[ing], or operat[ing] * * * a short-barreled shotgun." The Minnesota courts have interpreted that statute to include a knowledge requirement. See, e.g., State v. Salyers, 842 N.W.2d 28, 35 (Minn. Ct. App. 2014); see also State v. Ndikum, 815 N.W.2d 816, 821-822 (Minn. 2012) (interpreting similar firearm-possession statute).[3] Thus, unlike in Begay, the Minnesota statute does not

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[3] The court of appeals in this case did not expressly address the mens rea required to violate the Minnesota statute. But it relied (Pet. App. A6) on United States v. Lillard, 685 F.3d 773, 776 (8th Cir. 2012), cert. denied, 133 S. Ct. 1242 (2013), which addressed a Nebraska possession statute with a knowledge mens rea, suggesting that it believed the Minnesota statute contained a similar requirement.

In another case, United States v. Brown, 734 F.3d 824 (8th Cir. 2013), petition for cert. pending, No. 13-8407 (filed Jan. 23, 2014), the court of appeals "assume[d] that possession of a short-barreled shotgun was a strict liability crime when [the defendant] committed it in 1998." Id. at 826-827. But the Brown Court recognized that current Minnesota jury instructions require the government to prove knowledge to obtain a conviction, id. at 827 n.2, and petitioner does not contend that his 2007 conviction was for a strict liability offense. See

create a strict liability offense but rather requires proof of a culpable mental state. Accordingly, an inquiry into "risk levels provide[s] a categorical and manageable standard that suffices to resolve the case." Sykes, 131 S. Ct. at 2275-2276.

In any event, possession of a sawed-off shotgun satisfies both the risk-of-injury requirement of Sykes and the "purposeful, violent, and aggressive" standard of Begay. Short-barreled shotguns (also known as "sawed-off" shotguns) are "inherently dangerous because they are not useful except for violent and criminal purposes." United States v. Lillard, 685 F.3d 773, 776 (8th Cir. 2012) (internal quotation marks omitted), cert. denied, 133 S. Ct. 1242 (2013); see United States v. Strother, 384 Fed. Appx. 539, 541 (8th Cir. 2010) ("[A] short barreled shotgun within the parameters of the Missouri statute serves no lawful purpose and will inflict serious physical injury."), cert. denied, 131 S. Ct. 3021 (2011). As this Court has recognized, sawed-off shotguns are "not typically possessed by law-abiding citizens for lawful purposes." District of Columbia v. Heller, 554 U.S. 570, 625 (2008). "People do not shorten their shotguns to hunt or shoot skeet. Instead, the shortened barrel makes the guns easier to

---

Pet. 12-14 (arguing that his offense does not qualify as a "violent felony" because it can involve "passive" possession). In any event, the Brown Court concluded that the Minnesota offense qualifies as a "violent felony" even without a knowledge requirement. See 734 F.3d at 827.

conceal and increases the spread of the shot when firing at close range." United States v. Upton, 512 F.3d 394, 404 (7th Cir.), cert. denied, 555 U.S. 830 (2008). As the Eighth Circuit has correctly observed, "[p]ossession of a dangerous weapon that has no lawful purpose creates a serious potential risk of physical injury to others." United States v. Vincent, 575 F.3d 820, 825 (2009), cert. denied, 560 U.S. 927 (2010); see United States v. McGill, 618 F.3d 1273, 1276 (11th Cir. 2010) (same).

In addition, possession of a powerfully destructive weapon that is typically used for unlawful purposes indicates a readiness to engage in unlawful violence of the sort the ACCA was intended to prevent. See United States v. Brown, 734 F.3d 824, 827 (8th Cir. 2013) ("Possession of a short-barreled shotgun indicates that the offender is prepared to use violence if necessary and is ready to enter into conflict."), petition for cert. pending, No. 13-8407 (filed Jan. 23, 2014); Vincent, 575 F.3d at 826 (explaining that an offender's possession of a sawed-off shotgun makes it "more likely that [he], later possessing a gun, will use that gun deliberately to harm a victim") (quoting Begay, 553 U.S. at 145); see also Begay, 553 U.S. at 146 (noting that among the ACCA's "basic purposes" is a focus on the "special danger created" when the prior crimes of an individual convicted of violating Section 922(g) "show an increased likelihood that the offender is the kind of person who

might deliberately point the gun and pull the trigger"). Possession of a sawed-off shotgun is thus "associated with a likelihood of future violent, aggressive, and purposeful 'armed career criminal' behavior" in a way that drunk driving and other nonviolent felonies are not. Id. at 148.

The United States Sentencing Commission has reached a similar conclusion about the risks of possessing sawed-off shotguns in the commentary to Sentencing Guidelines § 4B1.2(a), whose definition of a predicate "crime of violence" closely tracks the ACCA's definition of a "violent felony." See Vincent, 575 F.3d at 826. The Guidelines and accompanying commentary define the term "crime of violence" to encompass possession of firearms described in 26 U.S.C. 5845(a), which includes any sawed-off shotgun with a barrel less than 18 inches in length. Sentencing Guidelines § 4B1.2, comment. (n.1); see 26 U.S.C. 5845(a). As this Court noted in James v. United States, 550 U.S. 192 (2007), the Sentencing Commission's conclusion that a predicate crime is a "crime of violence" provides "further evidence" that the same crime qualifies as a "violent felony" under the ACCA, because the "Commission, which collects detailed sentencing data on virtually every federal criminal case, is better able than any individual court to make an informed judgment about the relation between a particular

offense and the likelihood of accompanying violence." Id. at 206-207 (internal quotation marks and citation omitted).

2. Petitioner contends (Pet. 8-11) that this Court's review is warranted to resolve a division of authority among the courts of appeals on the proper characterization of offenses involving the possession of sawed-off shotguns. No developed circuit split warrants this Court's review at this time.

a. Before Begay, all but one of the courts of appeals to consider the issue, including the court below, had held that possession of a short-barreled (or sawed-off) shotgun qualifies either as a "violent felony" under the ACCA or as a "crime of violence" under the identically worded definition in Sentencing Guidelines § 4B1.2(a)(2). See United States v. Fortes, 141 F.3d 1, 8 (1st Cir.) (ACCA), cert. denied, 524 U.S. 961 (1998); United States v. Johnson, 246 F.3d 330, 334-335 (4th Cir.) (Guidelines), cert. denied, 534 U.S. 884 (2001); United States v. Serna, 309 F.3d 859, 864 (5th Cir. 2002) (Guidelines), cert. denied, 537 U.S. 1221 (2003); Upton, 512 F.3d at 404 (ACCA), called into question by United States v. Miller, 721 F.3d 435, 439-440 (7th Cir. 2013); United States v. Childs, 403 F.3d 970, 971 (8th Cir.) (ACCA), cert. denied, 546 U.S. 954 (2005). Only the Sixth Circuit had held otherwise. See United States v. Amos, 501 F.3d 524, 530 (2007) (ACCA).

In Amos, a divided panel of the Sixth Circuit held that a Tennessee statute prohibiting possession of a sawed-off shotgun did not qualify as a "violent felony."[4] In so holding, the court relied in part on circuit precedent requiring it to focus on the "least objectionable conduct" that would violate the statute at issue. 501 F.3d at 527 (internal citation omitted). The court reasoned that, because a defendant could, in theory, "be convicted for keeping an unloaded weapon locked or hidden in his attic or basement," mere possession of a weapon is insufficiently "assertive, violent conduct" to qualify under the ACCA. Id. at 529-530. This Court, however, has made clear that the ACCA does not require that "every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." James, 550 U.S. at 208. Rather, as Begay emphasized, the focus is on the "typical[]" case. 553 U.S. at 144.

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[4] Amos concerned former Tenn. Code Ann. § 39-6-1713 (West 1982), which prohibited, inter alia, the possession of a sawed-off shotgun in serviceable condition. See Amos, 501 F.3d at 526; Tenn. Code Ann. § 39-6-1714(6) (West 1982). A later-enacted Tennessee statute provides an affirmative defense if the defendant possessed a sawed-off shotgun "solely as a curio, ornament, or keepsake" and the weapon "was in a nonfunctioning condition and could not readily be made operable," or if "[t]he possession was brief and occurred as a consequence of having found the weapon or taken it from an aggressor." Tenn. Code Ann. § 39-17-1302(c) (West 1989).

Since Amos and Begay, the Sixth Circuit has held that possession of a sawed-off shotgun is a "crime of violence" under Sentencing Guidelines § 4B1.2(a) and its accompanying commentary. See United States v. Hawkins, 554 F.3d 615, 616-617 (6th Cir.), cert. denied, 557 U.S. 914 (2009). As explained above, the Sentencing Commission's conclusion that a predicate offense is a "crime of violence" provides evidence that the same offense is a "violent felony" under the ACCA. See pp. 10-11, supra. The future of Amos is thus unclear, and the Sixth Circuit thus may revisit its analysis in Amos in an appropriate case.

b. Since Begay, other than the court below, only two courts of appeals (the Seventh and Eleventh Circuits) have addressed this issue in published opinions. In United States v. McGill, 618 F.3d 1273, 1279 (2010), the Eleventh Circuit held that the Florida offense of possession of a short-barreled shotgun is not a "violent felony" for ACCA purposes. The court did not, however, purport to apply the risk-of-injury requirement that this Court applied most recently in Sykes. To the contrary, although acknowledging that possession of a short-barreled shotgun involves conduct that presents a serious risk of physical injury to others, id. at 1276, the Eleventh Circuit decided the case "narrowly on another ground" not briefed by the parties -- namely, that "possession of a short-barreled shotgun

is not 'similar in kind' to 'use of explosives,' its closest enumerated analog, or to the other crimes listed in the ACCA's residual clause." Id. at 1277.

The Eleventh Circuit's analysis is incorrect for several reasons. As a threshold matter, after that court had determined that "possessing an unregistered short-barreled shotgun involves conduct that presents a serious potential risk of physical injury to another" under the ACCA, McGill, 618 F.3d at 1276 (internal quotation marks omitted), it should have ended its analysis. Under the residual clause's text and this Court's recent cases, that finding of a serious potential risk to others was enough to treat the offense as a violent felony. See Sykes, 131 S. Ct. at 2273. The Eleventh Circuit, however, proceeded to analyze whether possession of a short-barreled shotgun is similar to the "use of explosives," which the court asserted was the most closely analogous enumerated offense in the ACCA. McGill, 618 F.3d at 1277-1279. That approach finds no basis in the ACCA's text or this Court's precedents. To the contrary, comparing an offense to the most closely analogous enumerated crime is the method that this Court used in James to determine whether the offense presents the requisite degree of risk. See 550 U.S. at 203-207 (comparing the offense of attempted burglary to the enumerated crime of burglary). Yet the Eleventh Circuit already had concluded in McGill that possession of a short-

barreled shotgun presents the requisite degree of risk -- making its additional step unnecessary.

Even taken on its own terms, the Eleventh Circuit's analysis is flawed. That court rested its decision on the National Firearms Act (NFA), 26 U.S.C. 5841 et seq., which prohibits the possession of any unregistered "firearm." The NFA defines the term "firearm" to include, inter alia, any "shotgun having a barrel or barrels of less than 18 inches in length," 26 U.S.C. 5845(a), and any "destructive device," 26 U.S.C. 5845(a) and (f). The Eleventh Circuit reasoned that because the NFA treats short-barreled shotguns and destructive devices in the same way, the ACCA also should treat them in the same way. And because the ACCA expressly lists crimes involving "the use of explosives" but not their possession, 18 U.S.C. 924(e)(2)(B)(ii) (emphasis added), the Eleventh Circuit concluded that the residual clause should be interpreted to include only crimes involving the use -- but not the possession -- of NFA-regulated firearms like short-barreled shotguns. See McGill, 618 F.3d at 1279.

That conclusion depends on a faulty premise. When the ACCA refers to "explosives," that term is much broader than the category of "destructive device[s]" regulated by the NFA. As the Eleventh Circuit itself has recognized, the NFA does not regulate all explosives. See United States v. Hammond, 371 F.3d

776, 780 (2004). Rather, the NFA regulates only a subset of particularly dangerous explosives that are designed for use as weapons: bombs, grenades, certain rockets and missiles, mines, and similar such devices. 26 U.S.C. 5845(f). That distinction makes sense: Congress regulated in the NFA the types of devices -- like short-barreled shotguns, bombs, or missiles -- that have no appropriate uses for sporting purposes or personal protection. Congress did not regulate other types of devices -- like handguns or dynamite -- that do have appropriate and lawful uses.

The ACCA does not draw that distinction: it covers all crimes involving the use of "explosives," without regard to the type of explosive at issue in the crime. The ACCA's enumerated category of crimes involving the use of explosives thus extends beyond the NFA's registration requirements. And the NFA sheds no light on the ACCA's residual clause, which encompasses crimes that "involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii) (emphasis added). As the court of appeals has explained, possession of a sawed-off shotgun presents a serious potential risk because of the way in which such a weapon is typically used, and thus "[p]ossession of a short shotgun presents the type of danger similar in kind to the use of explosives."

Lillard, 685 F.3d at 777. The Eleventh Circuit in McGill erred by looking beyond that risk-of-injury requirement to the NFA.

Because the issue was not briefed in McGill, however, the Eleventh Circuit did not address its previous decision in Hammond. The Eleventh Circuit also did not address its previous decision in United States v. Miles, 309 Fed. Appx. 329 (2009) (unpublished; per curiam), holding that possession of a short-barreled shotgun is a violent felony for ACCA purposes. Id. at 331. The court in Miles recognized, as the court below did, that the Sentencing Guidelines treat possession of a short-barreled shotgun as a "crime of violence," and "cases interpreting crime of violence under § 4B1.2 provide important guidance in determining what is a violent felony under the ACCA because the definition[s] for both terms are virtually identical." Ibid. (internal quotation marks omitted). Moreover, to the government's knowledge, no other court has looked to the NFA in determining whether possession of a short-barreled shotgun qualifies under the ACCA's residual clause.

Petitioner also relies (Pet. 9-10) on the Seventh Circuit's decision in United States v. Miller, 721 F.3d 435 (2013), in which that court held that possession of a short-barreled shotgun under a Wisconsin statute did not constitute a "violent felony" under the ACCA. To determine whether "a violation of Wisconsin's short-barreled shotgun possession prohibition, in

the ordinary case, presents a serious potential risk of physical injury," the court looked to reported Wisconsin appellate decisions, which it found "often involve a passive possession in which the weapon is not exposed to others." Id. at 439-440. From this sample, the court concluded that "in the ordinary case, the possession of a short-barreled shotgun does not create any potential risks of harm to another person because all that is involved is the knowing possession of a weapon." Id. at 440.

The Seventh Circuit's analysis is flawed. The court placed dispositive weight on a handful of reported appellate decisions, 721 F.3d at 439-440, not recognizing that such decisions necessarily represent only a subset of prosecutions under the Wisconsin statute. Further, the court acknowledged that "a short-barreled shotgun is quite dangerous" and that "possession of a short-barreled shotgun suggests that the possessor might take a step, if presented with the chance, toward using it with its advantages of enhanced ability to conceal and wide spread of shot," id. at 440 -- precisely the concern articulated in Begay. See 553 U.S. at 146 (the ACCA focuses on prior convictions suggesting an "increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger").

In any event, no conflict exists between Miller and the decision below because of key differences between the Wisconsin

statute in Miller and the Minnesota statute at issue here. The Wisconsin statute at issue in Miller sweeps more broadly and contains fewer permitted exceptions than the Minnesota statute. Wisconsin, but not Minnesota, criminalizes the sale and purchase of a short-barreled shotgun, compare Wis. Stat. Ann. § 941.28(2), with Minn. Stat. Ann. § 609.67(2), and the Minnesota statute provides a specific exception, not available in Wisconsin, for individuals who possess short-barreled shotguns that the State Bureau of Criminal Apprehension has determined "by reason of the date of manufacture, value, design or other characteristics to be primarily collector's items, relics, museum pieces or objects of curiosity, ornaments or keepsakes, and are not likely to be used as weapons," Minn. Stat. Ann. § 609.67(3)(3). The more limited nature of the Minnesota statute confirms that, whatever may be the case in Wisconsin, the "ordinary case" of possession of a short-barreled shotgun under Minnesota law (as under federal law) "presents a serious potential risk of physical injury to another," Sykes, 131 S. Ct. at 2273, and thus constitutes a "violent felony" under the ACCA.[5] And because Miller concerned a materially

[5] To the extent that reported decisions provide evidence of whether a conviction for a certain offense ordinarily involves a risk of harm to others, many of the reported Minnesota decisions involve the use of violence. See State v. Behl, 564 N.W.2d 560, 563 (Minn. 1997) (short-barreled shotgun used in a murder); Johnson v. State, 421 N.W.2d 327, 329 (Minn. 1988) (short-barreled shotgun used in an assault); State v. Knaeble, 652 N.W.2d 551, 552-553 (Minn. Ct. App. 2002) (defendant was in

distinguishable Wisconsin statute, it does not conflict with the decision below. Even if there was such a conflict, intervention by this Court would be premature because the other courts of appeals had not had an opportunity to address the question presented post-Sykes.

c. Petitioner also cites (Pet. 8) the Fourth Circuit's unpublished decisions in United States v. Haste, 292 Fed. Appx. 249 (2008) (per curiam), and United States v. Ross, 416 Fed. Appx. 289 (2011) (per curiam). Neither case creates binding circuit precedent, and there is no circuit conflict warranting this Court's review.

In Haste, the Fourth Circuit held, in an unpublished, per curiam opinion and without analysis, that a defendant's prior North Carolina conviction for possession of a weapon of mass destruction (specifically, a sawed-off shotgun) is not an ACCA "violent felony." 292 Fed. Appx. at 250. In a subsequent case interpreting "crime of violence" under the Guidelines, however, the Fourth Circuit held that possession of a sawed-off shotgun is a "crime of violence," and it specifically noted that Haste "provides no precedential authority." United States v. Hood, 628 F.3d 669, 671-672 (2010). Then, in Ross, the Fourth Circuit

---

possession of a short-barreled shotgun when he threw a gas can at his brother, threatened to "chop his head off," and then threatened law enforcement officers with a hammer); State v. Stafford, 385 N.W.2d 392, 393-394 (Minn. Ct. App. 1986) (short-barreled shotgun used in a shootout with police).

reiterated its view that a prior conviction for possession of a sawed-off shotgun qualifies as a "crime of violence" for Guidelines purposes. 416 Fed. Appx. at 291. In so doing, the court followed Hood and did not question whether such conduct would constitute a "violent felony" under the ACCA. The Fourth Circuit's precedential decisions are therefore consistent with the decision below. And all three decisions were issued before Sykes, which clarified the appropriate analysis under the residual clause. For that reason as well, further review of the decision below is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2014

IN THE SUPREME COURT OF THE UNITED STATES

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No. 13-7120

SAMUEL JAMES JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSOTION**, via e-mail and first class mail, postage prepaid, on this 28TH day of February, 2014.

SEE ATTACHED SERVICE LIST

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February 28, 2014

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Acting Supervisor, Case Management, Office of the Solicitor General, at (202) 514-8844, or email at SupremeCtBriefs@USDOJ.gov. Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

13-7120
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PETITIONER'S BRIEF

No. 13-7120

IN THE

Supreme Court of the United States

SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

SHOULD MERE POSSESSION OF A SHORT-BARRELED SHOTGUN BE TREATED AS A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT?

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TABLE OF CITED AUTHORITIES

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Cases

Abramski v. United States,
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Bailey v. United States,
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Begay v. United States,
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Boston Hous. Auth. v. Guirola,
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Descamps v. United States,
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Duncan v. Walker,
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James v. United States,
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Cited Authorities

Page

John R. Sand and Gravel Co. v. United States,
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Johnson v. United States,
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Cited Authorities

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People v Wright,
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People v. Yankaway,
2014 Ill. App. 2d 121048-U (Ill. Ct. App.
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Ratzlaf v. United States,
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State v. Beavers,
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State v. Garrett,
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State v. Guerra,
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State v. Winders,
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Taylor v. United States,
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Thompson v. State,
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United States v. Amos,
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United States v. Archer,
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United States v. Hammond,
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26 U.S.C. § 5841 26

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Ala. Code § 13A-11-63 28

Alaska Stat. Ann. § 11.61.200 28

Ariz. Rev. Stat. Ann. § 13-3102 28

Ark. Code § 5-73-104 28

Cal. Penal Code § 32215 28

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Ohio Rev. Code Ann. § 2923.17 28

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Utah Code Ann. 1953 § 76-10-509.4 27

Va. Code Ann. § 18.2-300 29

Wis. Stat. Ann. § 941.28 28

Conf. Rep. No. 90-1956, *reprinted in* 1968 U.S.C.C.A.N. 4426 (1968) 41

10B N.J. Pl. & Pr. Forms § 93:281. ..... .34

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U.S. Sentencing Guidelines and Sentencing Commission Materials

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Other Sources

Bureau of Alcohol Tobacco and Firearms Fact Sheet, May 2014, "U.S. Bomb Data Center." https://www.atf.gov/publications/factsheets/factsheet-us-bomb-data-center.html. 39

Firearms Used in the Commission of Crimes, California Department of Justice, 2009, 2010, 2011. 38

Michael Planty and Jennifer Truman, Firearm Violence, 1993-2011, Bureau of Justice Statistics, May 7, 2013, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4616..... 37

Bureau of Alcohol, Tobacco and Firearms website, https://www.atf.gov/content/library/firearms-forms 27

10A Minn. Prac., Jury Instr. Guides Criminal CRIMJIG 32,44 (5th ed.). 32

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was not published in the Federal Reporter, but is available at 2013 WL 3924353. It was issued on July 31, 2013. The judgment of the United States District Court for the District of Minnesota was not published. Both were attached as Appendices to the petition for a writ of certiorari. *See* Pet. App. A-1 A-7 (appellate decision); Pet. App. B-1 - B-4 (district court judgment).

JURISDICTION

Petitioner Samuel Johnson pleaded guilty to a violation of 18 U.S.C. § 922(g). He was sentenced to 180 months' imprisonment by the Honorable Richard H. Kyle, Senior United States District Judge.

The Eighth Circuit affirmed Mr. Johnson's sentence in an unpublished, per curiam opinion on July 31, 2013. Mr. Johnson did not seek rehearing. His petition for a writ of certiorari was filed on October 28, 2013. This Court granted the writ on April 21, 2014.

This Court has jurisdiction to review Mr. Johnson's case pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§ 924(e)(1) and (e)(2)(B) (Armed Career Criminal Act):

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)
>
> (e)(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that —
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;. . .

Minnesota Statute § 609.67

Sub. 1. Definitions.

> (b) "Shotgun" means a weapon designed, redesigned, made or remade which is intended to be fired from the shoulder and uses the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.
>
> (c) "Short-barreled shotgun" means a shotgun having one or more barrels less than 18 inches in length and any weapon made from a shotgun if such weapon as modified has an overall length less than 26 inches.

Sub. 2. Acts prohibited.

> Except as otherwise provided herein, whoever owns, possesses, or operates a . . . short-barreled shotgun may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

STATEMENT

1. Samuel Johnson was charged by Indictment with several offenses related to the possession of firearms. (Dist. Ct. No. 12-0104, D. Minn.) On June 6, 2012, he pleaded guilty to one count of being a felon in possession

of a firearm pursuant to 18 U.S.C. § 922(g)(1). In his written plea agreement, Mr. Johnson acknowledged that the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), might apply, raising the available penalties from no more than ten years in prison to a term of fifteen years to life imprisonment. (Plea Agreement, docket number 15.) However, Mr. Johnson reserved the right to challenge the application of the ACCA to his case.

2. The presentence investigation report (PSR) concluded that Mr. Johnson's criminal history contained three prior convictions that qualified as "violent felonies" under 18 U.S.C. § 924(e)(2)(B). (PSR ¶ 34.) Mr. Johnson had been convicted of simple robbery in 2007 and attempted simple robbery in 1999, and received stayed sentences for both offenses. (PSR ¶¶ 43, 41.) These convictions are not at issue in the instant petition.

3. The PSR also counted as an ACCA predicate offense Mr. Johnson's 2007 conviction for possession of a short-barreled shotgun in violation of Minn. Stat. § 609.67, subd. 2, an offense for which he also received a stayed sentence. (PSR ¶ 45.)

4. Mr. Johnson objected to his treatment as an armed career criminal in his sentencing filings to the district court. (Deft's Sent. Pos., dckt. no. 25.) Relevant to the present petition, he argued that mere possession of a short-barreled shotgun should not count as a violent felony. If that conviction were determined not to be a "violent felony," Mr. Johnson would not be an armed career criminal. However, Mr. Johnson acknowledged before the district court that the Eighth Circuit had ruled against his claim in previous decisions.

5. At sentencing, the district court rejected Mr. Johnson's arguments and ruled that all three of the prior convictions relied on by the government to enhance his sentence were violent felonies within the meaning of the ACCA. The district court sentenced Mr. Johnson to 180 months in prison, the statutory mandatory minimum. The court emphasized, however, that it would have imposed a lower sentence if it could. The court noted:

> For whatever it's worth, and it's probably worth nothing, I think 180 months is too heavy of a sentence in this case. But I take an oath to follow the law as I see it and I've made my decision in that regard. But, as I say, I impose the sentence reluctantly because I think a sentence of half that or two-thirds of that would be more than sufficient to qualify. But as I say, I do not have any choice in the matter, at least as I view it.

(Sentencing Hearing, September 5, 2012, Transcript at page 22, dckt. no. 39.)

6. Mr. Johnson appealed his sentence to the Eighth Circuit. (Case no. 12-3123.) He again argued that his prior conviction for possession of a short-barreled shotgun is not a "violent felony" under the ACCA. However, he acknowledged the court's prior contrary rulings in *United States v. Vincent*, 575 F.3d 820 (8th Cir. 2009), and *United States v. Lillard*, 685 F.3d 773 (8th Cir. 2012).

7. On July 31, 2013, the Eighth Circuit issued an unpublished per curiam opinion affirming Mr. Johnson's fifteen-year sentence. *United States v. Johnson*, 2013 WL 3924353 (8th Cir. 2013). The court relied on its precedent

to hold that possession of a short-barreled shotgun qualified as a violent felony under the "residual clause" to the ACCA:

> Our Circuit addressed the sentencing implications of possessing a short-barreled shotgun in *United States v. Lillard*:
>
> > Possession of a short shotgun presents a serious potential risk of physical injury to another because it is roughly similar to the listed offenses within the ACCA, both in kind as well as the degree of risk for harm posed. Lillard's possession of a short shotgun is a violent felony.
>
> Johnson's offense is not meaningfully distinguishable from the one in *Lillard*.

Johnson, slip op. at 6 (quoting *Lillard*, 685 F.3d at 777 (8th Cir. 2012)).

SUMMARY OF ARGUMENT

Samuel Johnson's punishment for being a felon in possession of a firearm was enhanced under the Armed Career Criminal Act (ACCA) to fifteen years in prison because he was once convicted of possessing a short-barreled shotgun in violation of Minnesota law. Without the enhancement, Mr. Johnson faced a sentence of no more than ten years. The significant increase in his sentence was error.

Mere possession of a short-barreled shotgun is not a violent felony within the meaning of the "residual clause" of the ACCA. This Court has held that, to qualify as a violent felony under that clause, an offense must be similar in kind and in degree of risk to the statute's enumerated offenses. Possession of a short-barreled shotgun fails both of these tests.

Possession of a short-barreled shotgun is not similar in kind to the enumerated offenses in several ways. Most significantly, none of the enumerated offenses are mere possession offenses. Moreover, possession of a short-barreled shotgun is not even a crime in a majority of states. In addition, in several jurisdictions that do criminalize possession of short-barreled shotguns, including Minnesota at the time of Mr. Johnson's offense, it is akin to a strict-liability offense. Because statutes like Minnesota's punish conduct amounting to no more than mere possession – conduct that is so obviously passive and nonviolent that it is widely legal – possessing a short-barreled shotgun is not purposeful, violent, or aggressive. It is therefore not a violent felony.

Mere possession of a short-barreled shotgun is also not similar in degree of risk to any of the enumerated offenses or to its closest analog, use of explosives. Simply possessing such a weapon presents little risk of physical injury, but the illegal use of explosives is extremely dangerous. Moreover, while statistics isolating the risk of simple possession of a short-barreled shotgun are not available, statistics involving use of firearms are. Those statistics reveal that handguns are used in far more crimes than short-barreled shotguns. In addition, legitimate uses exist for short-barreled shotguns, undermining a belief that possession of such weapons is inherently suspect.

Enhancing Mr. Johnson's sentence under the ACCA also contravenes the rule of lenity. That venerable doctrine mandates that, when struggling to interpret the scope of a criminal statue, ambiguity and doubt should be resolved in favor of the defendant, whose liberty is at stake. In this case, lenity mandates a finding that the ACCA's definition of violent felony, at a minimum, does not clearly include within its scope mere possession of a short-barreled shotgun.

The Eighth Circuit Court of Appeals erred when it determined that Samuel Johnson's prior conviction for possession of a short-barreled shotgun in violation of Minnesota law is a violent felony under the ACCA. His sentence should be vacated and his case remanded for resentencing.

ARGUMENT

I. MERE POSSESSION OF A SHORT-BARRELED SHOTGUN IS NOT A VIOLENT FELONY UNDER THE ACCA.

Mere possession of a short-barreled shotgun is not a violent felony under the Armed Career Criminal Act. This Court has held that, in order to trigger the enhancement of the ACCA under the residual clause, a predicate offense must be similar in kind and degree of risk to the enumerated offenses set forth in that clause. Mere possession of a short-barreled shotgun is neither.

First, the mere possession of an item, even an item such as a weapon, is not a "violent felony" under any interpretation of the term. Second, possession of

a short-barreled shotgun is widely legal, as long as it is registered in compliance with federal law. This fact alone indicates that a majority of jurisdictions do not believe it is dangerous enough to prohibit outright, and its legality in many places makes possession of a short-barreled shotgun, even where it is a crime, very different from the enumerated offenses. Third, possession of a short-barreled shotgun is not "purposeful, violent or aggressive," analysis that remains applicable in this case due to the passive nature of the offense conduct and the *mens rea* involved in many of the state statutes which address possession of short-barreled shotguns. Finally, possession of a short-barreled shotgun is nowhere near as risky as, nor in any way similar to, its closest analog in § 924(e)(2), the *use* of explosives.

A. The ACCA's Definition of Violent Felony: An Evolving Standard.

The present case is the latest in a series[1] that has called upon the Court to determine whether certain crimes constitute violent felonies under the Armed Career Criminal Act, an onerous recidivist statute that increases both the minimum and maximum penalties applicable to a person convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g). *See* 18 U.S.C. § 924(e). If a defendant has certain convictions in his criminal history, the sentencing options mandated by statute increase from

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1. *See Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Johnson v. United States*, 559 U.S. 133 (2010); *Sykes v. United States*, __U.S. __, 131 S. Ct. 2267 (2011); *Descamps v. United States*, __U.S. __ ,133 S. Ct. 2276 (2013).

zero to ten years in prison to fifteen years to life. *Compare* § 924(a)(2) *with* § 924(e). This significant enhancement applies when the defendant has three previous convictions for a "serious drug offense" or a "violent felony."

An offense is deemed a "violent felony" under 18 U.S.C. § 924(e)(2)(B) if it is a crime punishable by more than one year in prison that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Given the unclear language of the statute, this Court and lower courts have struggled for years with how to separate offenses that qualify as violent felonies from those that do not. *See, e.g., James v. United States*, 550 U.S. 192, 216 (2007) (Scalia, J., dissenting) ("Imprecision and indeterminancy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of the ACCA's residual provision, yet its boundaries are ill defined.")

The statute itself identifies three ways by which a prior conviction can be treated as a violent felony: the elements test, the enumerated offenses, and the "otherwise" or residual clause. Although the first two tests have certainly required this Court's attention more often than most criminal statutes in recent years – *see, e.g., Taylor v.*

United States, 495 U.S. 575 (1990) (enumerated offenses); *Johnson v. United States*, 559 U.S. 133 (2010) (element test); *Descamps v. United States*, 133 S. Ct. 2276 (2013) (enumerated offenses) – it is the residual clause that has given rise to four previous examinations by this Court since 2007, and which gives rise to today's inquiry.[2] Of course, as this Court has recognized, the residual clause cannot be read in isolation, but must be read within the context of the other parts of the "violent felony" definition. Such consideration demonstrates that possessing a short-barreled shotgun is not a violent felony.

1. Congress Designed the ACCA to Apply Uniformly and to Enhance Sentences for Offenders With Serious and Dangerous Criminal Histories.

What is known today as the Armed Career Criminal Act began life in 1984, and provided that a significant sentence enhancement should apply to anyone convicted of being a prohibited person in possession of a firearm who had three previous convictions "for robbery or burglary." *Taylor*, 495 U.S. at 581 (quoting Pub. L. 98-473, ch. 18, 98 Stat. 2185). In defining the scope of this enhancement, Congress intended to create national uniformity:

> Furthermore, in terms of fundamental fairness, the Act should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same

2. Underscoring the ambiguity of this provision, Justice Scalia has aptly referred to it as "the Delphic residual clause." *Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting).

> type of conduct is punishable on the Federal level in all cases.

S. Rep. No. 98-190, at 20. As the Court discerned in its examination of the legislative history of the ACCA in *Taylor*, Congress intended to employ uniform analysis, so that violations of various state statutes that punished similar conduct would be treated similarly for the purpose of future enhancement, even when the states themselves used differing terms to describe the criminal offenses. Whether in the 1984 iteration of the statute, which listed only robbery and burglary as predicates, or in the amended version of 1986, "Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled 'robbery' or 'burglary' by the laws of the state of conviction." *Taylor*, 495 U.S. at 588-89.

In addition to striving for uniformity and consistency, Congress also sought to apply the fifteen-year mandatory minimum penalty only to serious career recidivists. As Senator Arlen Specter stated when reopening the debate about the ACCA in 1986, the statute was intended as a "new tool to be used against the most dangerous criminals." 132 Cong. Rec. 7697. The drafters and proponents of the legislation sought to weed out minor crimes, non-felonies, and "just garden variety local crimes" from consideration as predicate offenses.[3] To this end, Congress ultimately decided that only "violent felonies" and certain serious

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3. Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong. 12 (May 21, 1986) (hereinafter "ACCA Subcommittee Hearing").

drug offenses would trigger the ACCA's application. Congress explicitly rejected a proposal made during the 1986 amendments to the Act that would have covered "*every* offense that involved a substantial risk of the use of 'physical force against the person or property of another.'" *Begay*, 553 U.S. at 144 (quoting *Taylor*, 495 at 583, in turn quoting S. 2312, 99th Cong., 2d Sess. (1986)). Instead, the drafters of the legislation sought to include grave offenses against property, even if they lacked an explicit element of force, but only when they presented a serious risk of injury. ACCA Subcommittee Hearing 15; *Taylor*, 495 U.S. at 584. After considering various options, including adopting just the "elements" test or the enumerated offense list alone, Congress adopted all three tests, pairing the enumerated examples explicitly with the residual clause as reflected in the current version of the ACCA. *See Taylor*, 495 U.S. at 587.

Ultimately, "use of explosives" was included in the list of enumerated offenses. Although the legislative history contains relatively little discussion regarding its initial inclusion in the list, a representative of the Department of Justice who spoke during the 1986 debates explained that "various explosives offenses involving, for example, the destruction of energy facilities or the destruction of public conveyances" would count as predicate offenses. ACCA Subcommittee Hearing 15 (testimony of James Knapp, Deputy Assistant Attorney General); *see also id.* at 23 (describing "use of explosives or firebombs to destroy a vehicle or building"). There is no mention in the legislative history that Congress or other proponents of the legislation intended it to cover mere possession of either explosives or firearms.

2. The Residual Clause Must Be Read in Conjunction With the Enumerated Offenses.

The residual clause of the violent felony definition includes those offenses that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). Despite the statute's less than pellucid phrasing, over the course of four decisions in five years, the Court has established that the enumerated felonies preceding the residual clause decisively inform which predicate offenses are covered by its language. "In our view, the provision's listed examples – burglary, arson, extortion, or crimes involving the use of explosives – illustrate the kinds of crimes that fall within the statute's scope." *Begay*, 553 U.S. at 142; *see also James*, 550 U.S. at 203 ("In this case, we can ask whether the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses . . . .").

> '[T]o give effect to every clause and word' of this statute, we should read the examples as limiting the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.

Begay 553 U.S. at 143 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (further internal quotation marks and citation omitted)).

Crimes that necessarily involve intentional and provocative behavior, such as the enumerated offenses themselves and vehicular flight from law enforcement as

addressed in *Sykes*, may require no more than comparing the risks attendant to the offense in question with the risks posed by the crime's closest analog among the enumerated offenses. *See Sykes*, 131 S. Ct. at 2275-76. In contrast, in considering offenses that lack such an element of aggressive or even intentional action, risk analysis alone would allow the inclusion of offenses "too unlike the provision's listed examples for [one] to believe that Congress intended the provision to cover [them]," *Begay*, 553 U.S. at 141-42, and analysis of the nature of the predicate offense is necessary.

Under any iteration of this Court's analysis, mere possession of a short-barreled shotgun is not a violent felony because it is neither similar in kind nor in degree of risk to any of the enumerated offenses.

B. Mere Possession of a Short-Barreled Shotgun Is Not a Violent Felony.

Mere possession of a short-barreled shotgun is not a violent felony because it does not involve conduct that "presents a serious potential risk of physical injury to another." First, it is not "similar in kind" in any way to the enumerated offenses. It is a crime of mere possession and nothing more, which distinguishes it entirely from the enumerated offenses and from inclusion as a violent felony. In addition, it is not universally or even widely criminalized, which also places it in marked contrast to the enumerated offenses. Finally, possession of a short-barreled shotgun is at times a strict-liability offense, which means that the analysis of *Begay* is uniquely relevant. The offense, regardless of *mens rea*, is never "purposeful, violent or aggressive."

Second, mere possession of a short-barreled shotgun is not as risky or dangerous as its closest analog among the enumerated offenses: use of explosives. A close examination of available data reveals that far more crimes are committed with handguns, which are almost universally lawful for possession by ordinary citizens, than with short-barreled shotguns. Concerns about the inherent danger of short-barreled shotguns, which led to their federal regulation in the first place, are not only based upon dated beliefs about their use by "gangsters," but are belied by the growing legal availability and possession of such weapons by law-abiding Americans. Indeed, fewer than a third of state governments have determined that mere possession of a short-barreled shotgun is risky enough to criminalize across the board.

1. Possession of a Short-Barreled Shotgun is Not "Similar in Kind" to the Enumerated Offenses.

This Court's analysis requires that an offense be "similar in kind" to the enumerated offenses in order to fall under the residual clause. *See* section I(A)(2), *supra*. In *Begay*, the Court explicitly rejected a suggestion that the enumerated crimes were included as nothing more than quantitative parameters, reasoning that the examples are "so far from clear in respect to the degree of risk each poses that it is difficult to accept clarification in respect to degree of risk as Congress' only reason for including them." *Begay*, 553 U.S. at 143. The *Begay* Court carefully examined the enumerated offenses for guidance and concluded that they "all typically involve purposeful, violent, and aggressive conduct." *Id.* at 144-45 (internal quotation marks omitted); *see also Chambers*, 555 U.S.

at 128. The Court explained that burglary involves unlawfully entering a building with intent to commit a crime, arson requires intentionally causing a fire with "the purpose of" destruction, and "use" of explosives suggests a higher degree of intent than negligent or accidental conduct. *Begay*, 553 U.S. at 145. When an offense – such as the negligent DUI in *Begay* or the passive failure-to-report in *Chambers* – is not intentional or violent, it is not similar to the enumerated offenses. This focus on the active and purposeful nature of the four enumerated offenses highlighted part of what it means to be "similar in kind."

In *Sykes v. United States*, the Court once again grappled with whether a contested offense was similar in kind as well as in degree of risk posed to the enumerated offenses. At issue in *Sykes* was an Indiana statute criminalizing fleeing the police in a motor vehicle. The Court described both the intentional nature of flight from law enforcement and the hazards it created:

> When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. A criminal who takes flight and creates a risk of this dimension takes action similar in degree of danger to that involved in arson, which also entails intentional release of a destructive force dangerous to others. . . . The attempt to elude capture is a direct challenge to an officer's authority. It is a provocative and dangerous act that dares, and in a typical case requires, the officer to give chase.

Sykes, 131 S. Ct. at 2273. The Court emphasized that in every instance and by its very nature, fleeing the police involves intentional defiance of lawful authority and use of a vehicle. *Id.*

The *Sykes* Court suggested that, in many cases, the examination of whether an offense involves "purposeful, violent and aggressive" conduct "will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others tend to be one and the same." 131 S. Ct. at 2275. *Sykes* explained that predicate offenses that involve intentional and very risky conduct like fleeing the police in a motor vehicle may not require the "redundant" analysis of *Begay's* "purposeful, violent and aggressive" test. *Id.* In contrast, "a crime akin to strict liability, negligence, and recklessness crimes" would likely still require the analysis. *Id.* at 2276.[4]

Possession of a short-barreled shotgun stands in marked contrast to the enumerated offenses in several ways: it is an offense of mere possession; it is widely

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4. The *Sykes* Court did not overrule *Begay* and *Chambers*, its decisions from just a few years before, but explained that the central analysis of those decisions might not always be necessary to examine whether an offense is included within the residual clause. *See Sykes*, 131 S.Ct. at 2285 (Scalia, J. dissenting) (noting that the purposeful, violent and aggressive test still exists and all three words must still have meaning); *id.* at 2289 n.1 (Kagan, J. dissenting) (noting that the purposeful, violent and aggressive test "will make a resurgence"); *see also Chambers*, 555 U.S. at 131 (Alito, J., concurring) (recognizing that "*stare decisis* in respect to statutory interpretation has 'special force'") (quoting *John R. Sand and Gravel Co. v. United States*, 552 U.S. 130, 139 (2008)).

legal rather than universally prohibited; and it is not "purposeful, violent and aggressive." Accordingly, it is not "similar in kind" to the enumerated offenses.

a. Possession Is Not Violent.

Perhaps the most important distinction between possession of a short-barreled shotgun and the enumerated offenses is that none of the listed crimes treat mere possession of anything as a violent felony. Indeed, the one enumerated offense that appears to base violent felony status on an item rather than an act requires *use* of that item: explosives.

By its very nature, the crime of possessing a short-barreled weapon requires possession and nothing more; that possession alone forms the basis for the requisite analytical comparisons. This Court has long counseled that determining whether a conviction under a particular state statute is a violent felony requires an examination of the elements of the offense and the specific conduct required to violate the statute, not speculation about what additional conduct might occur. In *Taylor v. United States*, the Court held that § 924(e) required a "categorical approach," looking "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." 495 U.S. at 600-01; *see also Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) ("The key is elements not facts.").

In *Johnson v. United States*, the Court suggested that, in deciding whether a predicate offense satisfies the definition of violent felony, a court should consider the "least of [the] acts" necessary to violate the statute and

nothing more. *Johnson*, 559 U.S. 133, 137 (2010) (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005) (plurality opinion)). In an even more recent decision exploring the way in which *Taylor's* categorical approach applies under the Immigration and Naturalization Act (INA), the Court further explained this "minimum conduct" assessment:

> Because we examine what the state conviction *necessarily* involved, not the facts underlying the case, we must presume that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, and then determine whether even those acts are encompassed by the generic federal offense.

Moncrieffe v. Holder, __ U.S. __, 133 S. Ct. 1678, 1684 (2013) (quoting *Johnson*, 559 U.S. at 137) (emphasis added). The *Moncrieffe* Court described this analysis as a "focus on the minimum conduct criminalized by the state statute," and suggested it would avoid using "legal imagination." *Id.* at 1684-85. With this guidance in mind, the Court must consider the basic passive elements of mere possession of a short-barreled shotgun, and not some imagined use of that shotgun, when comparing it to the enumerated crimes.

Examining the crime of possession of a short-barreled weapon demonstrates that it requires possession and nothing more. The Minnesota statute applies to "whoever owns, possesses or operates" a short-barreled shotgun. Minn. Stat. § 609.67, subd. 2. In Minnesota and most of the few states that prohibit possession of the weapon, the ban even applies to citizens who are otherwise permitted to own firearms, and there is no requirement that the

shotgun be used in or possessed during another crime. Indeed, in several cases prosecuted under Minnesota statute § 609.67 and other states' similar statutes, the weapon in question was possessed at home or in a closet or a locked gun cabinet.[5] As the Seventh Circuit noted in *United States v. Miller*, "short-barreled shotgun cases often involve a passive possession in which the weapon is not exposed to others." 721 F.3d 435, 439 (7th Cir. 2013).

> The range of conduct which could constitute knowing possession of a short-barreled shotgun can vary on a scale of risk of danger to others, but the mere possession of a weapon doesn't have to involve any risk. For example, brandishing the weapon, loading it, or actually pulling the trigger are all highly dangerous activities. But those separate actions go beyond the mere possession of the weapon. Something as simple as stuffing a

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5. *See, e.g., State v. Salyers*, 842 N.W.2d 28 (Minn. App. 2014) (short-barreled shotgun in locked gun cabinet); *State v. Robinson*, No. C3-01-2243, 2003 WL 347592 (Minn. App. Feb. 18, 2003) (short-barreled shotgun in closet); *State v. Guerra*, 565 N.W.2d 10 (Minn. App. 1997) (found in home with no allegation that it had been used in a crime. *See also State v. Beavers*, 912 A.2d 1105 (Conn. App. 2007) (short-barreled shotgun found in sheath in closet); *Thompson v. State*, 378 So.2d 859 (Fla. Dist. Ct. App. 1979) (gun found in trunk of repossessed car); *People v. Yankaway*, 2014 Ill. App. 2d 121048-U (Ill. Ct. App. June 9, 2014) (short-barreled shotgun found in top canopy in bedroom of house); *Boston Hous. Auth. v. Guirola*, 575 N.E.2d 1100 (Mass. 1991) (short-barreled shotgun found in broom closet); *People v. Etcheverry*, 347 N.E.2d 654 (N.Y. 1976) (short-barreled shotgun found in dresser); *State v. Garrett*, 635 N.W.2d 615 (Wis. Ct. App. 2001) (weapon found in closet).

> short-barreled shotgun (regardless of whether loaded or even assembled) under a mattress, a relatively passive and not inherently violent act, is all it takes to violate Wisconsin's law against possessing short-barreled shotguns.

Id. at 440. Therefore, in comparing possession of a short-barreled shotgun to the enumerated offenses, the appropriate conduct to compare is mere possession itself and nothing more.

In contrast, the enumerated offenses all involve active felonies and none criminalizes mere possession of an object. Possession is so unlike these action-based felonies that it cannot be described as "similar in kind." The closest analog among the listed offenses is "use of explosives," and the differences between use and possession are enormous.

This Court and others have recognized the significant difference between possessing and using something, even something potentially dangerous such as a firearm. In *Bailey v. United States*, 516 U.S. 137 (1995), this Court ruled that "use" of a firearm in relation to drug trafficking requires evidence of "active employment" of the firearm by the defendant. The Court observed that "use must connote more than mere possession of a firearm by a person who commits a drug offense." *Id.*; *see also United States v. Fish*, 368 F.3d 1200, 1203 (9th Cir. 2004) ("Federal law clearly recognizes a distinction between 'use' and 'possession.'") More recently, in *United States v. Castleman*, the Court addressed the meaning of the term "use of physical force" in the context of 18 U.S.C. § 922(g)(9), which prohibits gun possession by persons convicted of misdemeanor crimes of domestic violence. __ U.S. __, 134 S. Ct. 1405 (2014).

Although the Court made clear that § 922(g)(9)'s definition was not to be interpreted identically with the ACCA's very similar provision, 134 S. Ct. at 1410, its discussion of the word "use," is nonetheless instructive. "[It] is correct that under *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the word 'use' conveys the idea that the thing used (here, 'physical force') has been made the user's instrument." *Castleman*, 134 S. Ct. at 1410. As *Leocal* explained, "use most naturally suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. at 9.

Similarly, in lower court cases considering whether a predicate offense is a violent felony under the ACCA, several courts have emphasized that simple possession of an item, even a dangerous item, can never be enough. Long before the instructive analysis of *Begay*, the First Circuit found that possession offenses by their very nature do "not fit easily within the literal language of the statute." *United States v. Doe*, 960 F.2d. 221, 224 (1st Cir. 1992) (Breyer, J.) (considering whether felon-in-possession offenses should count as violent felonies under the ACCA). In *Doe*, the court found that there was little risk of physical harm accompanying the conduct that normally constitutes firearm possession, "for simple possession, even by a felon, takes place in a variety of ways (*e.g.*, in a closet, in a storeroom, in a car, in a pocket) many, perhaps most, of which do not involve likely accompanying violence." *Id.* at 224-25; *see also United States v. Oliver*, 20 F.3d 415, 418 (11th Cir. 1994) ("Th[e enumerated] offenses each manifest *affirmative, overt and active conduct* in which the danger posed to others extends beyond the mere possession of a weapon, and is far more threatening in an immediate sense.") (emphasis added); *see also United States v. Lane*, 252 F.3d, 905, 907 (7th Cir. 2001) (addressing possession of a gun in the context of a pretrial-release statute and noting

that "[t]he active use of a gun is a crime of violence in a way that mere possession of it, even if criminal, is not.").

More recently, the Eleventh Circuit explored the critical difference between possession offenses and the enumerated crimes in *United States v. Archer*. "The act of possession does not, without more, however, involve any aggressive or violent behavior." *Archer*, 531 F.3d 1347, 1351 (11th Cir. 2008) (concluding that carrying a concealed weapon is not a violent felony); *see also United States v. Alexander*, 217 F. App'x. 417 (6th Cir. 2007) (unpublished) ("[T]he enumerated violent felonies all typically require the offender to engage in active conduct. Just as an individual who merely *possesses* explosives or *possesses* a match does not commit a violent felony, so an individual who merely *possesses* a concealed weapon would not seem to commit such a crime.") (emphasis in original).

Finally, assuming possession of a short-barreled weapon is similar to possession of an explosive for this analysis, a conclusion that mere possession of a short-barreled shotgun is similar in kind and therefore a violent felony would functionally erase the term "use" from the phrase "use of explosives," thereby violating basic rules of statutory interpretation. The Court has held that it avoids a statutory construction that would render another part of the same statute superfluous. *See Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *Pennsylvania Dept. Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (expressing "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment"). This basic canon has been applied by lower courts to reject a reading of the definition of "violent felony" that functionally ignores the "use" which

precedes "explosives" by finding that mere possession of dangerous items is sufficient. *See United States v. Oliver*, 20 F.3d 415, 418 (11th Cir. 1994) ("Most significantly, the statute requires that the *use* – rather than possession – of explosives gives rise to a potential violent felony. It is unlikely that in enacting section 924(e), Congress intended that the possession of a firearm be deemed a violent felony, while the possession of explosives would not be so categorized."); *see also United States v. Fish*, 368 F.3d 1200, 1204 (9th Cir 2004) (holding that an interpretation that possession of a pipe bomb is crime of violence under the guidelines' similar provision "would render the provision's specific inclusion of '*use* of explosives' in the same section surplusage. [T]his interpretation would violate fundamental principles of statutory construction . . .").

In sum, one of the starkest differences between the crime of mere possession of a short-barreled shotgun and every one of the enumerated offenses is that none of them criminalizes the simple possession of an item. Even the current offense's closest analog explicitly requires "use" of a potentially dangerous object. For this reason alone, possession of a short-barreled shotgun is not "similar in kind" to the enumerated offenses and therefore not a violent felony.

b. Possession of Short-Barreled Shotguns Is Widely Legal.

Second, possession of short-barreled shotguns is legal in many states and, if properly registered, it is legal federally. In contrast, not a single enumerated offense, and indeed none of the offenses previously analyzed by this

Court regarding whether they are violent felonies (DUI, failure to surrender for service of a sentence, burglary, fleeing the police in a motor vehicle) are legal *anywhere*. While such offenses might be treated more severely in some states than others (for example, drunken driving, which is always a misdemeanor in some states but can be a felony in others) every state prohibits every one of these offenses. Possession of a properly registered short-barreled shotgun, fully legal in states ranging from Alaska to Wyoming, fundamentally differs from the enumerated offenses for this reason alone.

Federally, short-barreled shotguns, along with silencers, machine guns, explosives and certain other weapons, are highly regulated but not banned by the National Firearms Act, enacted in 1934. *See* 26 U.S.C. §§ 5801 *et. seq.* A person (or manufacturer) who makes a short-barreled weapon must register the weapon with the National Firearms Registration and Transfer Record and pay a tax of $ 200. 26 U.S.C. §§ 5821, 5822, 5841.[6] If the weapon is transferred, it must be registered by the transferor to the transferee. 26 U.S.C. § 5841(b). Possession or transfer of an unregistered short-barreled shotgun is a felony punishable by up to ten years in prison, 26 U.S.C. §§ 5861, 5871, but possession of a properly registered weapon is not, unless the person possessing the gun is otherwise a "prohibited person" under 18 U.S.C. § 922(g). Indeed, the website for the Bureau of Alcohol, Tobacco and Firearms ("BATF") provides forms for

6. It is noteworthy that, when the ACCA was enacted in 1984, and when it was amended two years later, Congress's decision to regulate rather than ban the possession of short-barreled shotguns had been the law of the land for several decades.

manufacturers of short-barreled shotguns and separate forms for transferees among the public (presumably purchasers) to use to register their weapons and pay the required tax.[7] According to the BATF, in 2013 more than 163,000 NFA Applications were processed for registration of all types of covered weapons, up more than 100,000 from the number of applications processed in 2005.[8]

Not only is possession of a properly registered short-barreled shotgun legal at the federal level, but a majority of states either do not specifically prohibit possession of short-barreled shotguns, or permit such possession as long as the firearm is registered in accordance with federal law. In eight states, no laws prohibit mere possession of short-barreled shotguns, and in two additional states such possession is permitted by adults.[9] In twenty-three states,

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7. https://www.atf.gov/content/library/firearms-forms (last visited June 23, 2014) (Form 5320.1 for making a NFA firearm and Form 5320.4 for transferring a NFA firearm).

8. *See* http://www.atf.gov/statistics/index.html.https://www.atf.gov/content/how-long-does-it-take-atf-process-my-nfa-application. (last visited June 23, 2014).

9. Counsel could locate no laws governing short-barreled shotguns or "sawed off shotguns" in the statutes of Kentucky, Mississippi, New Hampshire, New Mexico, Vermont, West Virginia, or Wyoming. In Montana, there is no prohibition against possession of a short-barreled shotgun if it is originally manufactured as such, but it is unlawful to possess a "sawed off" shotgun unless it is federally registered. Mont. Code Ann. § 45-8-340. In Idaho, possession of short-barreled shotguns is legal for adults, though prohibited for minors, Idaho Code Ann. § 18-3302F, and in Utah, possession itself by adults is not prohibited, but certain carrying of short-barreled shotguns is unlawful, as is possession by minors. Utah Code Ann. 1953 §§ 76-10-504 & 76-10-509.4.

possession of short-barreled shotguns by regular citizens is lawful if the gun is registered in compliance with the federal National Firearms Act,[10] and in four others if it is registered with a state agency.[11] In one of those states, Michigan, possession of short-barreled shotguns used to be unlawful, but that prohibition was repealed in 2014.[12] Only twelve states have statutes similar to Minnesota's, prohibiting possession of short-barreled shotguns by ordinary citizens regardless of compliance with federal registration.[13] Samuel Johnson's conduct, mere possession

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10. Ala. Code § 13A-11-63; Alaska Stat. Ann. § 11.61.200; Ariz. Rev. Stat. Ann. § 13-3102; Colo. Rev. Stat. Ann. § 18-12-102 (legal if registered for adults and non-felons); Conn. Gen. Stat. Ann. § 53a-211; Fla. Stat. Ann. § 790.221; Ga. Code Ann § 16-11-122; Kan. Stat. Ann. § 21-6301; Md. Public Safety § 5-203; Michigan Senate Bill 610 (2014); Neb. Rev. Stat. § 28-1203; Nev. Rev. Stat. Ann. § 202.275; N.Y. Penal Law § 265.02 (possession of originally manufactured short-barreled shotguns legal if registered; possession of sawed off shotguns illegal); N.D. Cent. Code Ann. § 62.1-02-03; Okla. Stat. Ann. tit. 21 § 1289.18; Or. Rev. Stat. Ann., § 166.272; 18 Pa. Cons. Stat. Ann. § 908; S.C. Code Ann. § 16-23-230; S.D. Codified laws § 22-14-6; Tenn Code Ann. § 39-17-1302; Tex. Penal Code Ann. § 46.05; Wis. Stat. Ann. § 941.28; Rev. Code of Wash. Ann. § 9.41.190.

11. La. Rev. Stat. Ann. § 40:1785 (requires registration with Department. of Public Safety); Me. Rev. Stat. tit. 15, § 393 (Commissioner of Public Safety); Mass. Gen. Laws. Ann. ch. 269, § 10 (local officials); Ohio Rev. Code Ann. § 2923.17 (local chief of police).

12. *See* Mich. C.L. Ann. § 750.224b, as amended Mi. SB 610 (2014).

13. Ark. Code § 5-73-104 (felony); Cal. Penal Code §§ 33210, 32215 (misdemeanor or felony); Del. Code Ann. tit. 11, § 1444 (felony); Haw. Rev. Stat. § 134-8 (felony); 720 Ill. C. Stat. 5/24-1 (felony); Ind. Code Ann. § 35-47-5-4.1 (misdemeanor or felony);

of a short-barreled shotgun, is *per se* criminalized in only twenty-six percent of states.[14]

In sum, a clear and essential difference between the offense at issue and every one of the offenses enumerated in § 924(e)(2) is that the latter punish conduct that is universally illegal, while the former does not. Because possession of a short-barreled shotgun is not similar to the enumerated offenses in this critical respect, it is not a violent felony under the ACCA.

c. Possession of a Short-Barreled Shotgun Is Not "Purposeful, Violent or Aggressive."

Mere possession of a short-barreled weapon does not involve the "purposeful, violent and aggressive" conduct contemplated by *Begay* and *Chambers*. *See Begay*, 553 U.S. at 144-45; *Chambers*, 555 U.S. at 128. Indeed, as argued above, the simple possession of a short-barreled weapon alone is neither violent nor aggressive; additional steps are required to convert simple possession into an act that uses violence or employs aggression. In addition, under several state statutes, the required *mens rea* is not even "purposeful."

Iowa Code Ann. § 724.1 (felony); Mo. Ann. Stat. § 571.020 (felony); N.J. Stat. Ann. 2C:39-3 (felony); N.C. Gen. Stat. Ann. § 14-288.8 (felony); R.I. Gen. Laws Ann. § 11-47-8 (felony); Va. Code Ann. § 18.2-300 (felony).

14. Admittedly, Mr. Johnson would have been precluded from possessing a shotgun of any length in any state, due to his status as a felon in 2007. That prohibition, found in both federal and Minnesota state law, is separate from and unrelated to the specific Minnesota prohibition against possessing a short-barreled shotgun.

It is true that in *Sykes*, the Court indicated that "*in many cases* the purposeful, violent and aggressive inquiry will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others *tend* to be one and the same." *Sykes*, 131 S. Ct. at 2275 (emphasis added). The Court also suggested that the purposeful, violent and aggressive inquiry, so central to its holding in both *Begay* and *Chambers*, was uniquely relevant in cases involving a lesser *mens rea* than the intentionality required by the fleeing statute it was then considering. *Id.* at 2275-76.

The possession offense in the present case, however, is one in which the risk analysis is *not* redundant with the "purposeful, violent and aggressive" inquiry. Neither the Minnesota statute, nor the other state statutes that prohibit mere possession of a short-barreled shotgun require any additional intent to use the firearm in a dangerous or criminal manner. In marked contrast, the Court in *Sykes* repeatedly described the high level of intentionality required by the felony fleeing-the-police statute; indeed, not only must a defendant intentionally flee, but inherent in this flight is a "determination to elude capture" and a "direct challenge" to an officer's authority. *Id.* at 2273-74. A confrontation with police has already occurred by the time the flight begins. *Id.*

Moreover, in some states and almost certainly in Minnesota when Mr. Johnson was convicted of his short-barreled shotgun offense, the offense is essentially one of strict liability: the prosecution need not even prove that the defendant was aware that the weapon he possessed had characteristics that rendered it unlawful. Although the

National Firearms Act itself was silent as to the required degree of intent for a violation, *see* 26 U.S.C. §§ 5861, 5871, in *Staples v. United States*, 511 U.S. 600 (1994), this Court held that the government must prove that a defendant is aware of the characteristics of a firearm – in *Staples* itself, its fully automatic status – that bring it under the requirements of the Act. However, that rule is not universally applied.

When Mr. Johnson violated the Minnesota statute in 2007, it was almost certainly a strict liability offense. Minnesota statute § 609.67 itself is silent as to the required *mens rea*, with no explicit requirement of knowledge or intent. The section of Minnesota's criminal code setting forth definitions specifies that "[w]hen criminal intent is an element of a crime in [the criminal code], such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" Minn. Stat. § 609.02 subd. 9 (2007). Therefore, the statute's absence of language regarding intent suggests that the statute lacks an explicit *mens rea* requirement. The Minnesota Supreme Court has never specifically addressed the degree of intentionality required to unlawfully possess a short-barreled shotgun.[15]

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15. A 2012 Minnesota Supreme Court decision interpreting another firearm statute concluded that, even though the law was silent as to *mens rea*, the state had to prove that the defendant knowingly possessed the firearm. *See State v. Ndikum*, 815 N.W.2d 816 (Minn. 2012). However, that case dealt with possession of a handgun, and there was no discussion about whether a defendant had to be aware of certain characteristics of the firearm. Moreover, that decision came several years after Mr. Johnson's conviction for possessing a short-barreled shotgun.

Moreover, in 2007 Minnesota's pattern jury instructions only required the government to prove two elements: that a defendant "owned or possessed" a weapon that met the statutory definition of short-barreled shotgun, and that he or she did so at a particular time and place. 10A Minn. Prac., Jury Instr. Guides Criminal CRIMJIG 32, 44 (5th ed. 2006). To be sure, the pattern jury instructions in effect today require the government to prove that the defendant "knew or had reason to know" that a firearm was a short-barreled shotgun in order to be convicted under § 609.67. *See* 10A Minn. Prac., Jury Instr. Guides Criminal CRIMJIG 32,44 (5th ed. 2012 version). This explicit *mens rea* requirement was inserted into the model jury instructions by a 2009 amendment, although it was not based on any change in the statute or appellate court decisions. *See* 10A Minn. Prac. Jury Instr. Guides Criminal CRIMJIG 32,44 (5th ed. 2009 Pocket Part).[16]

In sum, possession of a short-barreled shotgun in violation of Minnesota law was almost certainly a strict liability offense in 2007, and possibly remains one today. Minnesota is not alone.

Other states that regulate or prohibit possession of short-barreled shotguns adopt a wide range of *mens*

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16. In a recent Eighth Circuit decision addressing the "violent felony" status of possession of a short-barreled shotgun, the court assumed without deciding that the Minnesota offense had been a strict liability crime as of 1998, when the underlying predicate offense then before it had been committed. *See United States v. Brown*, 734 F.3d 824 (8th Cir. 2013); *see also State v. Salyers*, 842 N.W.2d 28, 35 (Minn. App. 2014) (affirming conviction under § 609.67 for a shotgun kept in a locked gun closet without discussing whether defendant knew barrel was short).

rea requirements for the offense. Several of the state statutes regulating or criminalizing possession of short-barreled shotguns are silent as to the required scienter, and jurisprudence from those states is either unclear or non-existent as to state of mind.[17] However, in other states, including Illinois, Iowa, Massachusetts, New Jersey and North Carolina, and Tennessee, the offense is one of strict liability: the government must only prove that the defendant knowingly possessed a weapon, but need not prove any knowledge of undersize length of the barrel.[18] In

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17. For instance, Florida Stat. Ann. § 790.221 does not specify a *mens rea* requirement regarding knowledge of the illegal characteristics of the gun, or even knowledge of the gun's presence, and Florida jurisprudence sheds little light. *See, e.g., Cummings v. State*, 633 So. 2d 559 (Fla. Dist. Ct. App. 1994) (holding defendant's proximity to short-barrel shotgun he denied knowledge of was enough to establish constructive possession); *but see McDaniels v. State*, 388 So. 2d 259 (Fla. Dist. Ct. App. 1980) (holding court abused its discretion in taking judicial notice of unproved elements of barrel length as well as overall length of shotgun). Montana Code Ann. § 45-8-340 prohibits "knowingly possess[ing]" a short-barrel or sawed-off shotgun, but Montana caselaw does not address whether ignorance as to the dimensions of the shotgun is a valid defense. Similarly, North Dakota Cent. Code Ann. § 62.1-02-03 does not specify a mens rea requirement with regards to knowledge of the illegal characteristic of the gun, or even knowledge of the gun's presence, and North Dakota caselaw does not clarify the applicable *mens rea*.

18. *See, e.g., State v. Winders*, 366 N.W.2d 193 (Iowa Ct. App. 1985) ("'knowingly' in statute [I. C. A. § 724.3] proscribing possession of offensive weapon merely requires that defendant had knowledge that she possessed weapon within general meaning of such term, rather than knowledge that she possessed an 'offensive weapon' as statutorily defined"); *United States v. Corona-Pena*, 432 F. App'x. 702 (9th Cir. 2011) (quoting *People v Wright*, 140 Ill.

very few states is the law clear that the government must prove that the defendant was aware of the characteristics of the weapon which subjected it to prohibition or greater regulation.[19]

In sum, in at least several of the states that criminalize possession of a short-barreled shotgun, the applicable

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App. 3d 576, 595 (1986) ("[720 ILCS 5/24-1] does not require that defendant in fact know the shotgun's barrel measured less than 18 inches")); *Com. v. O'Connell*, 738 N.E.2d 346, 351 (Mass. 2000) ("[T]he Commonwealth need not prove that defendant knew that the physical characteristics of the firearm he possessed (such as barrel length) rendered it subject to regulation [under Mass. Gen. Laws Ann. ch. 269, § 10]... his ignorance vis-à-vis that firearm's dimensions is not a valid defense."); 10B N.J. Pl. & Pr. Forms § 93:281 (jury instructions regarding possession of sawed-off shotgun do not require state to prove scienter in order to convict under N.J. Stat. Ann. § 2C:39-3); *State v. Watterson*, 679 S.E.2d 897 (N.C. App. 2009) (holding that violation of N.C. Gen. Stat. Ann. § 14-288.8 did not require proof that defendant knew the barrels of shotguns in his possession were less than 18 inches long); *United States v. Fogarty*, 344 F.2d 475, 478 (6th Cir. 1965) (Under Tennessee Code Ann. § 39-17-1302, "the mere possession of such a firearm is a violation of the statute. Scienter is not an element of the offense.")

19. *See e.g.*, *State v. Hill*, 970 S.W.2d 868 (Mo. Ct. App. 1998) (holding that state satisfied evidentiary burden under Mo. Ann. Stat. § 571.020 by establishing that defendant had reasonable notice that gun was "short-barreled," despite no knowledge of actual barrel length); *Kelly v. State*, 638 S.W.2d 203, 204 (Tex. App. 1982) ("The state had to prove that appellant did intentionally or knowingly possess a short-barrel firearm (as described in the indictment). The mistake of fact held by the appellant as to the length he had cut the barrel could negate the kind of culpability required for the commission of the offense."); *People v. King*, 38 Cal. 4th 617 (2006) (state must prove defendant knew gun had shortened barrel).

mens rea approximates strict liability. This means that in such states, including Minnesota in 2007, there can be little doubt that the degree of intentionality is on par with that required by driving while intoxicated, and therefore *Begay's* analysis remains relevant and essential.

Under the *Begay* test, mere possession of a short-barreled shotgun is not a violent felony because it is not "purposeful, violent and aggressive." As argued above, passive possession of the weapon alone is enough to violate the Minnesota statute and most others: such conduct is not "purposeful" in the way the enumerated crimes are and, by itself, is certainly not "violent" or "aggressive." This is a third reason the offense is not "similar in kind" to the enumerated offenses.

2. Mere Possession of a Short-Barreled Shotgun Presents Far Less Risk Than Its Closest Analog or Any Of The Enumerated Crimes.

This Court's precedent regarding the residual clause has emphasized that, in order for a prior conviction to count as a predicate offense, a close analysis of the risk presented by the offense is required. *See James*, 550 U.S. at 205-06; *Begay* 553 U.S. at 141-42; *Chambers*, 555 U.S. at 128-29; *Sykes*, 131 S. Ct. at 2273-75. "In general, levels of risk divide crimes that qualify from those that do not." *Sykes*, 131 S. Ct. at 2275 (citing *James*, 550 U.S. 192). To that end, the Court has held that "a crime involves the requisite risk when 'the risk posed by [the crime in question] is comparable to that posed by its closest analog among the enumerated offenses.'" *Id.* at 2273 (quoting *James*, 550 U.S. at 203); *see also Begay*,

553 U.S. at 149 (Scalia, J. concurring) (noting that *James*' analysis requiring comparison to closest analog must be followed for "unenumerated crimes that are analogous to enumerated crimes" such as the relationship between attempted burglary and burglary).

In order to compare the "degree of risk posed" between an offense and its closest analog, the Court has examined statistics to determine the extent to which a prior offense results in death or injury. Among the enumerated offenses and the other predicates reviewed by this Court, drunk driving creates the greatest degree of risk, causing 17,000 deaths in 2006 alone, and untold injuries. *Begay*, 553 U.S. at 141. At the other end of the risk spectrum was failing to report for service of a sentence, which led to no instances of violence among 160 cases examined. *Chambers*, 555 U.S. at 129. In *Sykes*, the Court noted that more than a hundred "nonsuspects" are killed each year in police chases, and many more people are injured, with between 4% and 17% of chases ending in injury. In burglaries of homes, in contrast, 3.2% of examined offenses resulted in injuries, and arson led to injury in 3.3 % of crimes. *See Sykes*, 131 S. Ct. at 2274-75.[20]

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20. Although statistics have certainly been important in this Court's analysis, the Court has made clear that "they are not dispositive." *Sykes*, 131 S. Ct. at 2274. Indeed, in *Begay*, the Court found that drunk driving is not a violent felony under the ACCA despite the fact that the offense kills more people each year than all of the other enumerated offenses combined. Moreover, a singular focus on statistics has been criticized, as such data is rarely uniform and its meaning often subject to debate and manipulation. *See, e.g.*, *Sykes*, 131 S. Ct. at 2286 (Scalia, J., dissenting) (describing contradictions in data and concluding that "our statistical analysis in ACCA cases is untested judicial fact finding masquerading as statutory interpretation").

Mere possession of a short-barreled shotgun cannot be described as presenting a risk of injury on par with either its closest analog or with any of the other enumerated offenses. Such statistics as are available do not suggest that mere possession of short-barreled shotguns is as risky as the use of explosives. Admittedly, precise statistical analysis regarding how often injury occurs in conjunction with the simple possession of a short-barreled shotgun is difficult to locate, but statistics regarding gun crimes in general are not. The Bureau of Justice Statistics within the United States Department of Justice issued a report entitled Firearm Violence, 1993-2011 (May 2013).[21] Although the report contained no specific data regarding short-barreled shotguns, it analyzed crimes nationwide committed with firearms in each of the years between 1994 and 2011. On average in those years, 71.4% of all homicides committed with guns and 91.3% of all nonfatal violence committed with guns were committed with handguns. The report contained no separate category for short-barreled shotguns, but all shotguns, rifles and "other types of firearms" together made up a very clear minority of violence involving firearms.[22]

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21. Michael Planty and Jennifer Truman, Firearm Violence, 1993-2011, Bureau of Justice Statistics, May 7, 2013, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4616 (Last visited June 25, 2014).

22. Even these statistics, which demonstrate that short-barreled shotguns are used in many fewer violent crimes than handguns, are not squarely applicable to the current case because they measure the use of guns in crime. The rate of injury or death from mere possession of a short-barreled shotgun is certain to be far less than the rate of injury from active crimes involving short-barreled shotguns, but it is the possession offense only that must be analyzed. *See Moncrieffe*, 133 S. Ct. at 1684.

Similarly, an annual report prepared by the California Department of Justice, Bureau of Forensic Services entitled "Firearms Used in the Commission of Crimes" details the "number and type of firearms used most frequently in the commission of violent, homicidal, street and drug trafficking crimes."[23] Between 2009 and 2011, the Bureau examined 441 firearms that had been used in crimes within its service area.[24] Among those were 378 handguns, an assortment of other firearms, and only four short-barreled shotguns or rifles. During those three years, handguns were used in 85.7% of all crimes, 82.9% of non-fatal crimes of violence, 84.7 % of homicides and 90.0% of crimes committed by gangs.

Such statistics demonstrate that, among firearms, short-barreled shotguns are involved in, at most, a small minority of crimes involving guns, and represent a very small percentage of injuries caused by gun crimes. Any belief that short-barreled shotguns are, today, more commonly used by criminals than other types of firearms, and therefore somehow indicative of criminality in and of themselves is simply not borne out by this data.

The risk posed by unlawful use of explosives is, in contrast, substantial. As explored above, the term "use"

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23. Kamala D. Haris, 2009 Firearms Used in the Commission of Crimes, State of Cal. Dept. of Justice, 2009, http://ag.ca.gov/publications/Firearms_Report_09.pdf; 2010 Firearms Used in the Commission of Crimes, 2010, http://ag.ca.gov/publications/Firearms_Report_10.pdf; 2011 Firearms Used in the Commission of Crimes, 2011, http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/Firearms_Report_11.pdf. (Last visited June 25, 2014)

24. Admittedly, these surveys involve only a small subset of gun crimes occurring in California.

in the inclusion of explosives in the enumerated crimes list is important. *See* section C(1)(a), supra. Use of explosives necessarily entails an active employment of a dangerous item, rather than merely passive possession. The legislative history of the ACCA's 1986 amendment certainly reflects that Congress contemplated the inclusion of very dangerous active crimes such as "destruction" of energy facilities and public conveyances. *See* section A(1), *supra.* While statistics are not readily available specifically for crimes involving the use of explosives, it is difficult to imagine that the rate of injuries and even death from such offenses is not very great indeed.[25] In contrast, the crime of mere possession of a sawed-off shotgun does not require the weapon to be used, nor even require the gun to be shown to another person or brandished at any time. Possession alone is enough. The risk presented by such mere possession is certain to be extremely low indeed.

Lower federal courts have at times presumed mere possession of short-barreled shotguns to be risky by adopting the oft-repeated but never substantiated adage that such weapons "are not useful except for violent and

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25. The ATF publishes a fact sheet which describes "Explosives Incidents in the United States," and injuries and deaths resulting from them. The rate of injury and death ranged from 7.6% in 2004 and 7.1 % in 2013, at the high end, to less than 1 % in 2011. However, because the analyzed incidents included "stolen explosives and other categories," in addition to crimes clearly involving the active use of explosives, like bombings and attempted bombings, the injury rates for actual "use of explosives" are certain to be higher. *See* Bureau of Alcohol Tobacco and Firearms Fact Sheet, May 2014, "U.S. Bomb Data Center."

https://www.atf.gov/publications/factsheets/factsheet-us-bomb-data-center.html (Last visited June 23, 2014)

criminal purposes." *See* e.g., *United States v. Lillard*, 685 F.3d 773, 776 (8th Cir. 2012) (quoting *United States v. Childs*, 403 F.3d 970, 971 (8th Cir. 2005)). Such a presumption, however, relying as it does on visions of short-barreled weapons from gangster movies and gun lore, goes too far. As explored above, short-barreled shotguns are possessed legally, following legitimate federal registration, by an increasing number of ordinary nonviolent citizens in many states. Even criminal court decisions demonstrate valid and benign uses to which the weapons are put. *See, e.g., United States v. Buffalo*, 10 F.3d 575 (8th Cir. 1993) (noting that defendant used sawed-off shotgun to "shoot skunks, weasels, and racoons that killed his chickens"); *United States v. Hammond*, No. 90-30333, 1991 WL 103450 (9th Cir. June 11, 1991) (unpub'd) (affirming district court's finding that defendant intended to use short-barreled shotgun only for hunting purposes, including hunting of grouse). The availability of such examples is especially striking because only a minority of prosecutions for short-barreled shotgun possession result in appellate court decisions.

Moreover, the same features that originally gave rise to the reputation of the weapon as inherently offensive and violent in nature lead gun manufacturers to advertise it today as ideal for the protection of one's home and family.[26] Even states like Minnesota, which generally prohibit possession of short-barreled shotguns, make exceptions for their possession by members of the military, law

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26. *See, e.g.*, http://www.impactguns.com/benelli-m4-entrycbq-14 ("Now the same Benelli M4 used by the U.S. Marine Corps can be your home defense shotgun of choice," offering for sale a shotgun with a 14" barrel and noting that "all NFA rules apply") (last visited on June 24, 2014).

enforcement, trainers, corrections officers, and some security guards, in seeming recognition of the weapon's value in self-defense and defense of others. *See* Minn. Stat. 609.67, subs 3 & 5. And Michigan's recent legalization of possession of properly registered short-barreled shotguns reflects a growing national recognition that such possession is neither inherently nefarious nor risky.

Citizens living in states where their possession is lawful can buy brand new short-barreled weapons either in a gun store or online, register them and pay the tax, and possess them legally for home defense, hunting, collection, or any other non-violent reason. In the past, the belief that short-barreled shotguns were primarily used by criminals, even "gangsters," might have been substantiated both by their use in notorious and high-profile crimes, and by the fact that such weapons had to be made intentionally by sawing off a longer barrel from a traditional shotgun. Indeed, that belief motivated Congress, in 1934, to require their registration and taxation under the National Firearms Act, although not to ban such weapons outright. *See, e.g.*, Conf. Rep. No. 90-1956, *reprinted in* 1968 U.S.C.C.A.N. 4426, 4434 (1968) ("National Firearms Act covers gangster-type weapons such as machine guns, sawed-off shotguns, short-barreled rifles, mufflers and silencers.") But that seven-decades old belief alone, particularly when contradicted by the rise of law-abiding people properly registering specially regulated weapons like short-barreled shotguns, is not enough for this Court to conclude that mere possession of such a weapon presents a risk similar to the use of explosives or, for that matter, any of the other enumerated offenses.

In sum, the risk presented by the mere possession of short-barreled shotguns is simply not on par with that presented by use of explosives or any of the other enumerated offenses set forth at § 924(e)(2)(B)(ii).

C. Several Circuit Courts Have Correctly Analyzed the Issue: The Eighth Circuit Did Not.

In light of the plain meaning of the term "violent felony," and under both the risk-centric analysis of *Sykes* and the more multi-faceted analysis of *Begay* and *Chambers*, mere possession of a short-barreled shotgun in violation of Minn. Stat. § 609.67 is not a predicate offense for purposes of the ACCA. The analysis of the Eighth Circuit in finding otherwise is contrary to this Court's teachings, and several other courts have reached the correct conclusion, either explicitly or indirectly.

The Sixth, Seventh, and Eleventh Circuits have all ruled that possession of a sawed-off or short-barreled weapon is not a violent felony within the meaning of the residual clause of § 924(e). *United States v. Amos*, 501 F.3d 525 (6th Cir. 2007); *United States v. Miller*, 721 F.3d 435 (7th Cir. 2013); *United States v. McGill*, 618 F.3d 1273, 1279 (11th Cir. 2010). The Fourth Circuit has reached the same conclusion in two unpublished opinions. *See United States v. Haste*, 292 Fed. Appx. 249 (4th Cir. 2008)(unpub'd); *United States v. Ross*, 416 Fed. Appx. 289 (4th Cir. 2011)(unpub'd). [27] A close examination of several

27. The Tenth Circuit has not reached the question of whether possession of a short-barreled shotgun is a violent felony under the ACCA, but its ruling regarding the application of a separate

of those decisions supports Mr. Johnson's position that mere possession of a short-barreled shotgun is not a violent felony.

In *United States v. Miller*, decided one month prior to the Eighth Circuit's decision below, the Seventh Circuit conducted a searching analysis and concluded that violation of Wisconsin's statute prohibiting possession of a shotgun with a short barrel is not a violent felony. *Miller*, 721 F.3d 435, 439-40 (7th Cir. 2013). Following an examination of the many ways in which the Wisconsin statute could be violated by "passive possession in which the weapon is not exposed to others," the court found that "the risk of physical injury to another presented by the mere possession of a short-barreled shotgun is not in the same league as the risks presented by the offenses of burglary, arson, extortion, or crimes involving the use of explosives." *Id.* at 439-440. The *Miller* court specifically analyzed and rejected the Eighth Circuit's decisions from *Vincent* and *Lillard*, and noted it would be following the contrary holdings of the Sixth and Eleventh Circuits.

> We simply don't think that the latent risks inherent in the offense of possessing a short-barreled shotgun are sufficient to qualify for the residual clause when the crimes from which we are instructed to guide our determination – burglary, arson, extortion, and crimes involving the *use* of explosives – all are inherently risky

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firearm statute to short-barreled weapons suggests that it would follow the Sixth, Seventh and Eleventh Circuits. *See United States v. Serafin*, 562 F.3d 1105 (10th Cir. 2009)(finding short-barreled shotgun possession not a crime of violence under related provision of § 924(c)(3)(B)).

> without that extra step required for the risk to manifest.

Id. at 443.[28]

The Sixth Circuit reached the same conclusion as the Seventh, though in a decision issued even prior to this Court's decision in *Begay*. In *United States v. Amos*, 501 F.3d 524 (6th Cir. 2007), the court found that violation of a Tennessee statute criminalizing mere possession of a sawed-off shotgun was not a violent felony under the ACCA. The *Amos* court noted that possession does not "fit well with the more active crimes included in the statute." *Amos*, 501 F.3d at 528. The court also found a difference between crimes that carry a risk of violence and those that carry a "future" risk. *Amos*, 501 F.3d at 528-29.

The Eleventh Circuit also correctly concluded that mere possession of a short-barreled shotgun is not a violent felony under the ACCA. *See United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010). The *McGill* court noted that

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28. The *Miller* court rejected the government's suggestion that the ACCA's residual clause must be read to include possession of a short-barreled shotgun because, in the commentary to the Sentencing Guidelines, the Sentencing Commission concluded that it was covered by the definition of "crime of violence" used for the career offender guideline enhancement. *See* U.S.S.G. § 4B1.2, comment. (n.1) ("Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g. a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'"). The *Miller* court found that possession of a short-barreled shotgun was added to the crime of violence definition in 2004, before *James*, *Begay* and their progeny, and "how courts look at ACCA's residual clause has changed since this amendment." *Miller*, 721 F.3d at 442.

both short-barreled shotguns and explosives are regulated in the same manner by the National Firearms Act, requiring registration and taxation, as described above. *Id.* at 1279. Although Congress treats them largely the same in the NFA, the court found it important Congress did not include possession of explosives in the enumerated offenses, but only "use of explosives." "We cannot classify *possessing* one type of NFA outlawed weapon as a violent felony when the ACCA speaks only to the *use* of another." *McGill*, 618 F.3d at 1279.[29]

Only the Eighth Circuit has specifically addressed the issue since this Court's decisions from *Begay*, *Chambers and Sykes*, and still concluded that possession of a short-barreled shotgun is a violent felony.[30] In light of the above-analysis, the Eighth Circuit's decisions on this point were reached in error. The Eighth Circuit rested its reasoning in *Vincent* and *Lillard* almost entirely on the belief that "[s]awed-off shotguns 'are inherently dangerous and lack usefulness except for violent and criminal purposes.'"

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29. Although the Eleventh Circuit reached the correct result in *McGill*, the court erroneously concluded that weapons governed by the National Firearms Act were functionally outlawed due to the onerous nature of the law's registration and taxation requirements. *McGill*, 618 F.3d 1273, 1278-79. However, as explored above more than a 160,000 applications are processed by the ATF each year under the NFA. Therefore, although the requirements of the NFA are certainly stringent, the Act cannot fairly be described as a complete bar to possession.

30. This decision joined the First Circuit, which ruled in 1998 in *United States v. Fortes* that possession of such a weapon counts as an ACCA predicate. 141 F.3d 1, 6-8 (1st Cir. 1998). Although the First Circuit reaffirmed this holding in 2006, it has not assessed it in the wake of *Begay* and its progeny. *See United States v. Bishop*, 453 F.3d 30, 31 (1st Cir. 2006).

Vincent, 575 F.3d at 825 (quoting *United States v. Childs*, 403 F.3d 970, 971 (8th Cir. 2005) (additional quotations omitted); *see also Lillard*, 685 F.3d at 776-77 (adopting "inherently dangerous" analysis to conclude that violation of Nebraska statute regarding short-barreled shotguns is a violent felony). In conducting its risk analysis, and without reference to either statistics or examples from cases, the *Vincent* court held: "Possession of a dangerous weapon that has no lawful purpose creates a serious potential risk of physical injury to others." *Vincent*, 575 F.3d at 825. The court used the same logic in the "similar in kind" half of its analysis. "Like the listed crimes, possession of a sawed-off shotgun is illegal precisely because it enables violence or the threat of violence." *Id.* at 826. Finally, the Eighth Circuit noted that its decision was supported by the fact that commentary to the sentencing guidelines' definition of "crime of violence" expressly included short-barreled shotgun possession. *Id.* at 825-826 (citing U.S.S.G. § 4B1.2(a), commentary (n.1), which includes possession of a short-barreled shotgun as a predicate offense). Nowhere did the Eighth Circuit consider that possession of a short-barreled shotgun is widely legal, and that such guns are registered federally every day by law-abiding citizens in states where they are allowed. Nor did the Court refute the analysis of dissenting Judge Gruender, who warned that the Eighth Circuit's holding "risks expanding the ACCA's residual clause to include any crime that has a hypothetical connection to violence." *Vincent*, 575 F.3d at 831 (Gruender, J., dissenting). As Judge Gruender said, "once the question is properly framed and the relevant terms are expressly defined, it becomes plain that simple possession of a sawed-off shotgun itself does not involve violent and aggressive conduct in the manner of burglary, arson, extortion, or criminal use of explosives."

In total, three circuits have expressly held in published opinions that possession of a short-barreled shotgun is not a violent felony, one has so held in unpublished opinions, one circuit has not addressed the question but would likely follow suit based upon related precedent, and only two clearly persist in concluding that such mere possession is a violent felony under the ACCA. Mr. Johnson urges that the majority of these circuits has reached the proper result, and urges this Court to so hold.

II. THE RULE OF LENITY REQUIRES THE COURT TO HOLD THAT MERE POSSESSION OF A SHORT-BARRELED SHOTGUN IS NOT A VIOLENT FELONY.

As argued above, possession of a short-barreled shotgun is not a violent felony under the ACCA in light of the plain language of that statute, its structure and legislative history, and this Court's jurisprudence interpreting its provisions. However, if the Court is not decisively persuaded, it should nonetheless rule in favor of Mr. Johnson under the rule of lenity. That venerable doctrine mandates that, when struggling to interpret the scope of a criminal statue, ambiguity and doubt should be resolved in favor of the defendant, whose liberty is at stake. In this case, lenity mandates a finding that the ACCA's definition of violent felony, at a minimum, does not clearly include within its scope mere possession of a short-barreled shotgun.

A. The Rule of Lenity is An Important "Liberty-Protecting and Democracy Promoting" Rule.[31]

The rule of lenity, also described as the canon of "strict construction of criminal statutes," *United States v. Lanier*, 520 U.S. 259, 266 (1997), provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *See Abramski v. United States*, __ U.S. __, __ S. Ct. __, 2014 WL 2676779, * 19 (June 16, 2014) (Scalia, J., dissenting) (citing *Skilling v. United States*, 561 U.S. 358, 410 (2010)). Such a rule "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Lanier*, 520 U.S. 259, 266 (1997).

In *United States v. Santos*, 553 U.S. 507, 514 (2008), this Court applied the rule of lenity to conclude that when there are two equally plausible interpretations of a term in a criminal statute, the "tie" must go to the defendant.

> The rule of lenity requires ambiguous criminal laws to be interpreted in favor of defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia on the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

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31. *Abramski v. United States*, 2014 WL 2676779, * 19 (Scalia, J., dissenting).

Santos, 553 U.S. 514 (internal quotations and citations omitted); *see also United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring) ("Where it is doubtful whether the text includes the penalty, the penalty ought not be imposed.").

Certainly, the rule of lenity should not be the first line of analysis used by a court when attempting to discern the meaning of a criminal statute, but it is an essential final step when other efforts have failed. As Justice Scalia recently explained:

> [T]he rule of lenity applies whenever, after all legitimate tools of interpretation have been exhausted, "a reasonable doubt persists" regarding whether Congress has made the defendant's conduct a federal crime, *Moskal v. United States*, 498 US 103, 108 (1990) – in other words, whenever those tools do not decisively dispel the statute's ambiguity.... "[W]here text, structure, and history fail to establish the government's position is unambiguously correct... we apply the rule of lenity and resolve the ambiguity in [defendants]'s favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994)."

Abramski, at * 19 (Scalia, J., dissenting) (internal citations omitted).

B. The Rule of Lenity Requires a Conclusion That Possession of a Short-Barreled Shotgun Is Not a Violent Felony Under the ACCA.

As explored above, it would take a strained and virtually limitless reading of the definition of violent

felony to include mere possession of a short-barreled shotgun within its scope. But should the Court be left weighing the government's expansive interpretation or the narrower one advocated by the Petitioner, that "tie" must go to Mr. Johnson. The split among the Circuits and the wide legality of possession of short-barreled shotguns, combined with the plain language of the ACCA, its legislative history and this Court's jurisprudence all give rise to a "reasonable doubt" as to whether possession of a short-barreled shotgun is a violent felony, if not to a more reasonable certainty that it is not. *See Moskal*, 498 U.S. at 108.

The rule of lenity has been described as a "liberty protecting and democracy promoting rule that is 'perhaps not much less old than construction itself.'" *Abramski*, at * 19 (Scalia, J., dissenting) (quoting *United States v. Wiltberger*, 5 Wheat. 76 (1820) (Marshall, C.J.)). It should serve that function in this case by supporting a conclusion that mere possession of a short-barreled shotgun is not a violent felony under the ACCA. "[W]hen a criminal statute has two possible readings, we do not choose the harsher alternative unless Congress has spoken in language that is clear and definite." *Abramski*, at *19 (Scalia, J., dissenting) (internal quotations omitted) (quoting *Bass*, 404 U.S. at 347-49). In this case, any "tie" must be read in favor of lenity and of Mr. Johnson.[32]

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32. As Justice Scalia aptly observed in his concurrence in *Begay*, "I will not condemn a man to a minimum of fifteen years in prison on the basis of such speculation. Applying the rule of lenity to a statute that demands it, I would reverse the decision of the Court of Appeals." *Begay*, 553 U.S. at 154. (internal citation omitted)(Scalia, J., concurring).

CONCLUSION

Because possession of a short-barreled shotgun in violation of Minnesota statute § 609.67 does not constitute a violent felony, Samuel Johnson does not qualify as an armed career criminal. Therefore, this Court must vacate the judgment of the Eighth Circuit and remand the case for further proceedings.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 13-7120

In the Supreme Court of the United States

SAMUEL JAMES JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's prior felony conviction under Minnesota law for possession of a short-barreled shotgun is a "violent felony" under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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§ 21-6301(a)(5) 8
§ 21-6301(b)(2) 8
§ 21-6301(d) 8
§ 21-6301(h) 8
La. Rev. Stat. Ann. (2008 & Supp. 2014):
§ 40:1781(3) 8
§ 40:1785 8
§ 40:1791 8
Md. Code Ann. (2012):
Crim. Law § 4-201(g) 8
Pub. Safety :
§ 5-203(a)(2) 8

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§ 5-203(c) 8

Mass. Gen. Laws Ann. (2014):

Ch. 140, § 121 8

Ch. 269, § 10(c) 8

Mich. Comp. Laws Ann. (West Supp. 2014):

§ 750.222(i) 8

§ 750.224b(1)-(4) 8

§ 750.224b(2) 24

Minn. Stat. Ann. (West 2009):

§ 609.67.1(c) 9

§ 609.67.2 9

§ 624.714, subd. 1a 9

Mo. Stat. (West 2014):

§ 571.010(17) 9

§ 571.020.1(6)(b) 9

§ 571.020.3 9

Mont. Code Ann. (2013) :

§ 45-8-340(1)(b) 9

§ 45-8-340(1)(c) 9

§ 45-8-340(3)(f) 9

§ 45-8-340(4) 9

Neb. Rev. Stat. Ann. (LexisNexis 2009):

§ 28-1201(10) 8

§ 28-1203 8

Nev. Rev. Stat. Ann. (LexisNexis 2012):

§ 202.275(1) 8

§ 202.275(2)(b) 8

§ 202.275(3)(b) 8

N.J. Stat. Ann. (2012):

§ 2C:39-1(*o*) 9

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N.Y. Labor Law §§ 450 *et seq.* 53
N.Y. Penal Law (McKinney Supp. 2014):
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§ 265.01-b 9
N.C. Gen. Stat. (2013):
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§ 14.288.8(b)(5) 8
§ 14.288.8(c)(3) 8
§ 14.288.8(d) 8
N.D. Cent. Code (2010):
§ 62.1-01-01.13 8
§ 62.1-02-03 8
Ohio Rev. Code Ann. (LexisNexis 2010 & Supp. 2014):
§ 2923.11(F) 8
§ 2923.11(K)(1) 8
§ 2923.11(K)(3) 53
§ 2923.17 53
§ 2923.17(A) 8
§ 2923.17(C)(5) 8
§ 2923.17(D) 8
§ 2923.18 53
Okla. Stat. Ann. (West 2012):
§ 1289.18(A) 8
§ 1289.18(C) 8
§ 1289.18(D) 8
Or. Rev. (2013):
§ 166.210(12) 9
§ 166.272(1) 9

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§ 166.272(2) 9
§ 166.272(4) 8
18 Pa. Cons. Stat. Ann. (West Supp. 2014):
§ 908(a) 9
§ 908(b)(1) 9
§ 908(c) 9
R.I. Gen. Laws (2012) 9
§ 11-47-2(1) 9
§ 11-47-8(b) 9
S.C. Code Ann. (2003):
§ 16-23-210(b) 9
§ 16-23-230 9
§ 16-23-250 9
S.D. Codified Laws (2006):
§ 22-1-2(8) 9
§ 22-1-2(46) 9
§ 22-14-6 9
Tenn. Code Ann. (2010):
§ 39-17-1301(15) 9
§ 39-17-1302(a)(4) 9
§ 39-17-1302(b)(7) 9
§ 39-17-1302(d)(2) 9
Tex. Local Gov't Code §§ 235.001 *et seq.* 53
Tex. Penal Code Ann. (West Supp. 2014):
§ 46.01(10) 9
§ 46.05(a)(3) 9
§ 46.05(c) 9
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Va. Code Ann. (2014):
§ 18.2-299 9

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§ 18.2-300 9
§ 18.2-303.1 9
Wash. Rev. Code Ann. (West 2010 & Supp. 2014):
§ 9.41.010(2) 9
§ 9.41.190(1) 9
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Wis. Stat. Ann. (West 2005):
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§ 941.28(2)-(4) 9
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Section 479.86 6
Section 479.101(a)(3) 7
Section 479.105 6
United States Sentencing Guidelines:
§ 4B1.2, comment. (n.1) 35
App. C, Amend. 674 35

Miscellaneous:

After Action Report, Washington Navy Yard, September 16, 2013, Internal Review of the Metropolitan Police Department, Washington, D.C. 9 (July 2014), http://mpdc.dc.gov/sites/default/files/dc/sites/mpmp/publication/attachments/MPD%20AAR_Navy%20Yard_07-11-14.pdf 38
Army Field Manual 3.06-11, § 3-20 (Feb. 28, 2002) 21

Miscellaneous—Continued: Page

Barrow and Woman are Slain by Police in Louisiana Trap, N.Y. Times, May 24, 1934 4

Michael Bussard, *Ammo Encyclopedia* (2008) 23

7 Chicago Gangsters Slain by Firing Squad of Rivals, Some in Police Uniforms, N.Y. Times, Feb. 14, 1929 4

Dave Cullen, *Columbine* (2009) 37

J.M. Di Maio, M.D., *Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques* (1985) 32, 33

FBI:

Expanded Homicide Data Table 8, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2008-2012.xls (2012) 40

Photo Gallery: Navy Yard Shootings, http://www.fbi.gov/news/navy-yard-shootings-investigainve/image/photo-gallery-navy-yard-shootings 37

Type of Injury by Type of Weapons/Force Involved, http://www.fbi.gov/about-us/cjis/ucr/nibrs/2012/table-pdfs/type-of-injury-by-type-of-weapon-force-involved-2012 (2012) 41

Brian J. Heard, *Handbook of Firearms and Ballistics: Examining and Interpreting Forensic Evidence* (1997) 33

H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. (1968) 23

H.R. Rep. No. 1780, 73d Cong., 2d Sess. (1934) 5

H.R. Rep. No. 1714, 82d Cong., 2d Sess. (1952) 23

Miscellaneous—Continued: Page

Lee Kennett & James LaVerne Anderson, *The Gun in America* (1975) 4

Tom Kenworthy, USA Today, *Video Shows Columbine Gunmen Laughing During Target Practice* (Oct. 22, 2003), http://usatoday30.usatoday.com/news/nation/2002-10-22-columbine-gunmen_x.htm 37

National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means, 73d Cong., 2d Sess. 22 (1934) 26

Remington Model 870 Police Breacher System (11.5-inch barrel), www.remingtonle.com/shotguns/870breacher.htm 21

S. Rep. No. 1444, 73d Cong., 2d Sess. (1934) 4, 22

S. Rep. No. 1495, 82d Cong., 2d Sess. (1952) 23

S. Rep. No. 1622, 83d Cong., 2d Sess. (1954) 23

Thomas F. Swearengen, *The World's Fighting Shotguns* (1978) 3, 4

The Report of Governor Bill Owens' Columbine Review Commission, http://www.state.co.us/columbine/Columbine_20Report_WEB.pdf 37

Union Boss Slain by Gang in Chicago, N.Y. Times, Mar. 20, 1931 4

William F. Varr III, *Shotgun Eye Injuries: Ocular Risk and Eye Protection Efficacy*, 99 Ophthamology 869 (June 1992) 33

Michael S. Ward, *Sawed-off Shotgun, the Effect of Barrel Length on Shot Pattern Size*, 45 AFTE Journal 40 (Winter 2013) 33

James M. Wilson, M.D., *Shotgun Ballistics and Shotgun Injuries (Trauma Rounds – San Francisco General Hospital)*, 129 Western J. Med. (Aug. 1978) 3

In the Supreme Court of the United States

No. 13-7120

SAMUEL JAMES JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is not published in the *Federal Reporter* but is reprinted in 526 Fed. Appx. 708.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2013. The petition for a writ of certiorari was filed on October 28, 2013, and was granted on April 21, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, at 2a-32a.

STATEMENT

Following a guilty plea in the United States District Court for the District of Minnesota, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 180 months of imprisonment under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A7.

1. a. A shotgun is a shoulder-fired long gun that is typically used to fire a cluster of pellets called "shot" made from lead or other material. See generally Vincent J.M. Di Maio, M.D., *Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques* 163-182 (1985) (Di Maio). The pellets are packed into the front of a cartridge called a "shell." See *id.* at 170 (illustration). The rear area of the shell contains gunpowder that ignites when the firing pin of the shotgun strikes the shell's primer. The resulting explosion propels the shot pellets down the barrel of the gun and out of the muzzle. See Michael Bussard, *Ammo Encyclopedia* 177-178 (2008) (Bussard). Unlike rifles or ordinary handguns, which fire single bullets and have "rifled" (grooved) barrels that cause the bullets to spin, increasing accuracy, a shotgun is smooth-bored. Di Maio 163. As a result, the pellets shoot forth in a spread pattern. See Bussard 192-193; Fig. 1, App., *infra*, 1a.

The velocity (and hence distance traveled) of individual pellets fired from a shotgun is less than that of a bullet fired from a similarly powerful rifle. See Bussard 192-193. But at relatively short distances, a shotgun's spread discharge is more likely to hit a small or moving target than a single bullet, and the target can be hit by numerous individual pellets across its body. See James M. Wilson, M.D., *Shotgun Ballistics and Shotgun Injuries (Trauma Rounds – San Francisco General Hospital)*, 129 Western J. Med. 151-152 (Aug. 1978) (Wilson). And when a target is shot at very close range, the pellets are still clustered together when they make contact, producing a wide cavity in the target. Di Maio 195. Many shotguns have a "choke," which narrows the barrel at a point near the muzzle, thereby causing the pellets to remain clustered together for a longer distance and extending the gun's effective range. See Bussard 194, 221-222.

Shotguns were originally used primarily for hunting, as they still are today, because the spread discharge makes the weapon effective at hitting elusive game like birds and deer—thus, small pellets are called "birdshot," while larger pellets are called "buckshot." See Thomas F Swearengen, *The World's Fighting Shotguns* 1 (1978) (Swearengen). Shotguns' military use emerged during the Civil War, when Confederate soldiers brought the weapons into battle. See *id.* at 5-6. Cavalrymen would often saw down the barrel to make the guns easier to fire from horseback. See *id.* at 6. In World War I, U.S. soldiers used shortened shotguns to attack enemy trenches and machinegun nests. See *id.* at 9.

During the Prohibition Era, the "short-barreled" or "sawed-off" shotgun, which provides the same explosive discharge as a regular shotgun but can be more easily concealed and handled in close quarters, became the weapon of choice for gangsters and bank robbers, along with machineguns. See Swearengen 11-12; see also Lee Kennett & James LaVerne Anderson, *The Gun in America* 202-203 (1975). Al Capone's men used two sawed-off shotguns and two machineguns to execute the members of a rival gang in the Valentine's Day Massacre of 1929. See *7 Chicago Gangsters Slain by Firing Squad of Rivals, Some in Police Uniforms*, N.Y. Times, Feb. 15, 1929, at A1. Chicago union leader Wild Bill Rooney was gunned down in the street in 1931 by a "sawed-off shotgun [that] was pointed through a rear window" of an automobile. *Union Boss Slain by Gang in Chicago*, N.Y. Times, Mar. 20, 1931, at 52. And when Clyde Barrow and Bonnie Parker were ambushed and killed by the police in 1934, officers found Barrow "clutching a sawed-off shotgun in one hand." *Barrow and Woman are Slain by Police in Louisiana Trap*, N.Y. Times, May 24, 1934, at A1.

b. In 1934, Congress responded to "[t]he growing frequency of crimes of violence in which people are killed or injured by the use of dangerous weapons" by enacting the National Firearms Act (NFA), ch. 757, 48 Stat. 1236. H.R. Rep. No. 1780, 73d Cong., 2d Sess. 1 (1934) (NFA House Report); see S. Rep. No. 1444, 73d Cong., 2d Sess. 1 (1934) (NFA Senate Report) (same). The NFA reflects the belief that "while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law

officer should have a machine gun or sawed-off shotgun." NFA House Report 1. The statute aims to prevent criminals from acquiring short-barreled shotguns, machineguns, and other weapons with no ordinary private uses by requiring, under threat of criminal penalty, that anyone who wishes to take possession of such a weapon register it with the federal government and pay a tax.

As amended and recodified,[1] the NFA regulates "firearm[s]" under a specialized definition that covers particularly dangerous items, including "a shotgun having a barrel or barrels of less than 18 inches in length" as well as "a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length." 26 U.S.C. 5845(a)(1) and (2); see 26 U.S.C. 5845(d) (definition of "shotgun"). The statute also includes within its specialized definition of "firearm" short-barreled rifles, machineguns, silencers, and "destructive device[s]"—a category that includes grenades, rockets, missiles, and other explosives designed for use as a weapon. 26 U.S.C. 5845(a)-(c) and (f).

Under the NFA and implementing regulations of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), in order to transfer a so-called "NFA firearm" to an individual, the transferor must submit an application to the ATF that includes the "fingerprints and [the] photograph" of the transferee, as well as the weapon's serial number. 26 U.S.C. 5812(a),

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[1] See National Firearms Act Amendments of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1227-1235 (26 U.S.C. 5801-5872 (1970)).

5842(a), 5845(j); 27 C.F.R. 479.84-479.86.[2] A state or local law-enforcement official must certify that the fingerprints and photograph belong to the transferee and that the official "has no information indicating that the receipt or possession of the firearm would place the transferee in violation of State or local law or that the transferee will use the firearm for other than lawful purposes." 27 C.F.R. 479.85. Upon receipt of an application, the ATF examines criminal records, including the National Instant Criminal Background Check System, to determine whether "the transfer, receipt, or possession of a firearm would place the transferee in violation of law." 27 C.F.R. 479.86. If it would—for example, because the transferee is a felon, see 18 U.S.C. 922(g)(1)—the ATF must deny the application. 26 U.S.C. 5812(a); 27 C.F.R. 479.86. Similar registration requirements apply to an individual who seeks permission to convert a regular shotgun into a short-barreled shotgun (although background checks are not required by regulation). See 26 U.S.C. 5821-5822, 5845(i); 27 C.F.R. 479.62-479.65.[3] The statute also requires manufactur-

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[2] As originally enacted, the NFA lodged implementation authority in the Secretary of the Treasury. See §§ 1(j), 12, 48 Stat. 1237, 1240. The ATF, which was established as an independent bureau within the Treasury Department in 1972, was transferred, along with its NFA functions, to the Department of Justice by the Homeland Security Act of 2002. See Pub. L. No. 107-296, § 1111(a)(1) and (c)(1), 116 Stat. 2274, 2275.

[3] In the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102, 100 Stat. 453, Congress generally prohibited the transfer or possession of machineguns. See 18 U.S.C. 922(*o*). Accordingly, the ATF will not register a machinegun unless it falls within an exception to the ban (such as for weapons lawfully possessed before the effective date of the prohibition). See 27 C.F.R. 479.105.

ers, importers, and dealers of covered firearms to register with the ATF. See 26 U.S.C. 5802, 5845(k)-(m).

The ATF maintains a "central registry of all [NFA] firearms in the United States which are not in the possession or under the control of the United States," called the National Firearms Registration and Transfer Record. 26 U.S.C. 5841(a). That database contains, among other information, the name and address of any person entitled to possess a particular firearm. 27 C.F.R. 479.101(a)(3).

The NFA makes it a criminal offense, punishable by up to ten years in prison, to possess an NFA firearm made or transferred in violation of the statute. See 26 U.S.C. 5861(b)-(d), 5871. Conviction requires proof that the individual "knew the weapon he possessed had the characteristics that brought it within the statutory definition" of an NFA firearm. *Staples* v. *United States*, 511 U.S. 600, 602, 619 (1994). In *United States* v. *Miller*, 307 U.S. 174 (1939), this Court upheld against a Second Amendment challenge the NFA's criminal prohibition on the possession of unregistered short-barreled shotguns. *Id.* at 178. That constitutional guarantee, the Court has explained, "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *District of Columbia* v. *Heller*, 554 U.S. 570, 625 (2008).

c. Congress has also imposed other restrictions on short-barreled shotguns. In the Omnibus Crime Control and Safe Streets of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 229, Congress prohibited anyone other than a licensed importer, manufacturer, dealer, or collector from transporting a short-barreled shotgun

in interstate commerce unless the transport is "specifically authorized by the Attorney General consistent with public safety and necessity." 18 U.S.C. 922(a)(4); see 27 C.F.R. 478.28; see also 18 U.S.C. 922(b)(4). And in the Crime Control Act of 1990, Pub. L. No. 101-647, § 1101, 104 Stat. 4829, Congress amended the criminal provision prohibiting the use or carrying of a weapon during and in relation to violent crimes and serious drug offenses to impose greater penalties if the weapon involved is a short-barreled shotgun. See 18 U.S.C. 924(c)(1)(B)(i).

d. Twenty-eight States have effectively incorporated the NFA into their own law by criminally prohibiting the possession of short-barreled shotguns not registered with the federal government (and, in some jurisdictions, local authorities).[4] Valid registration is

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[4] See Ala. Code 13A-11-62(5), 13A-11-63(a) (LexisNexis 2005 & Supp. 2013); Alaska Stat. § 11.61.200(a)(3), (h) and (i) (2012); Ariz. Rev. Stat. §§ 13-3101(8)(a)(iv), 13-3102(A), (C)(4) and (L) (2005 & Supp. 2013); Ark. Code §§ 5-1-102(20), 5-73-104(a)(3) and (c)(3) (2005 & Supp. 2013) (permitting possession "as authorized by law"); Colo. Rev. Stat. §§ 18-12-101(1)(i), 18-12-102(1), (3) and (5) (2013); Conn. Gen. Stat. Ann. §§ 53a-3(17) and (19), 53a-211 (West 2012 & Supp. 2014); Fla. Stat. Ann. §§ 790.001(10), 790.221 (West 2007); Ga. Code Ann. §§ 16-11-121(5), 16-11-122, 16-11-123, 16-11-124(4) (2011); Kan. Stat. Ann. § 21-6301(a)(5), (b)(2), (d) and (h) (2011); La. Rev. Stat. Ann. §§ 40:1781(3), 40:1785, 40:1791 (2008 & Supp. 2014); Md. Code Ann. Crim. Law §§ 4-201(g), Pub. Safety 5-203(a)(2) and (c) (2012); Mass. Gen. Laws 140 § 121; 269 § 10(c) (2014); Mich. Comp. Laws Ann. §§ 750.222(i), 750.224b(1)-(4) (West Supp. 2014); Neb. Rev. Stat. Ann. §§ 28-1201(10), 28-1203 (Lexis Nexis 2009); N.C. Gen. Stat. §14.288.8(a), (b)(5), (c)(3) and (d) (2013); N.D. Cent. Code §§ 62.1-01-01.13, 62.1-02-03 (2010); Nev. Rev. Stat. Ann. § 202.275(1), (2)(b) and (3)(b) (LexisNexis 2009); Ohio Rev. Code Ann. §§ 2923.11(F) and (K)(1), 2923.17(A), (C)(5) and (D) (LexisNexis 2010 & Supp. 2014); Okla. Stat. Ann.

often established as an affirmative defense. In addition, 11 States and the District of Columbia have banned possession of the weapons outright.[5] The state statutes typically define a short-barreled shotgun identically or very similarly to the short-barreled shotguns regulated by the NFA, and many include exceptions for law-enforcement personnel and for curios and antiques.[6]

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§ 1289.18(A), (C) and (D) (West 2012); Or. Rev. Stat. §§ 166.210(12), 166.272(1), (2) and (4) (2013); 18 Pa. Cons. Stat. Ann. §§ 908(a), (b)(1) and (c) (West Supp. 2014); S.C. Code Ann. §§ 16-23-210(b), 16-23-230, 16-23-250 (2003); S.D. Codified Laws §§ 22-1-2(8) and (46), 22-14-6 (2006); Tenn. Code Ann. §§ 39-17-1301(15), 39-17-1302(a)(4), (b)(7) and (d)(2) (2010); Tex. Penal Code Ann. §§ 46.01(10), 46.05(a)(3), (c) and (e) (West Supp. 2014); Va. Code Ann. §§ 18.2-299, 18.2-300, 18.2-303.1 (2014); Wash. Rev. Code Ann. §§ 9.41.010(2), 9.41.190(1), (2) and (5) (West 2010 & Supp. 2014); Wis. Stat. Ann. § 941.28(1)(c) and (2)-(4) (West 2005).

[5] See Cal. Penal Code §§ 17180, 33210, 33215 (West 2012); D.C. Code §§ 7-2501.01(15), 22-4514(a) and (c) (LexisNexis 2001); Del. Code Ann. tit. 11, § 1444 (2008); Haw. Rev. Stat. Ann. § 134-8(a) and (d) (LexisNexis 2013); 720 Ill. Comp. Stat. Ann. 5/24-1(a)(7)(ii) and (b) (West 2010); Ind. Code Ann. §§ 35-47.1-10, 35-47-5-4.1(a) (LexisNexis 2009); Iowa Code Ann. §§ 724.1.2, 724.3 (West 2014); Minn. Stat. Ann. §§ 609.67.1(c), 609.67.2 (West 2009); Mo. Stat. §§ 571.010(17), 571.020.1(6)(b), 571.020.3 (West 2014); N.J. Stat. Ann. §§ 2C:39-1(*o*), 2C:39-3(b) (2012); N.Y. Penal Law §§ 265.00(3), 265.01-b (McKinney Supp. 2014); R.I. Gen. Laws §§ 11-47-2(1), 11-47-8(b) (2012).

[6] Idaho, Kentucky, Maine, Mississippi, New Hampshire, New Mexico, Utah, Vermont, West Virginia, and Wyoming have no general bar on possession. Montana prohibits the possession of a shotgun modified to have a short barrel that has not been federally registered, but not a short-barreled shotgun originally manufactured as such. See Mont. Code Ann. § 45-8-340(1)(b), (c), (3)(f) and (4) (2013).

Despite these legal restrictions, short-barreled shotguns are still employed in robberies, gang violence, drug trafficking, organized crime, and isolated atrocities. See note 14, *infra* (citing examples from case law).

2. Petitioner is a convicted felon who came to the FBI's attention in 2010 through his involvement with an organization called the National Socialist Movement, which advocates white-supremacist views and violence against minority groups. Pet. App. A2; Revised Presentence Investigation Report (PSR) ¶ 5. The FBI believed that petitioner's organization was mobilizing to engage in domestic terrorism. Pet. App. A2; PSR ¶ 5. In June 2010, petitioner left the National Socialist Movement to found the Aryan Liberation Movement, which he planned to support by counterfeiting United States currency. Pet. App. A2; PSR ¶¶ 6, 11. Throughout 2010, a confidential source and an undercover FBI agent were in regular contact with petitioner. PSR ¶¶ 5-6.

In November 2010, petitioner revealed to the confidential source and undercover agent that he had manufactured napalm, other explosives, and silencers for the Aryan Liberation Movement. Pet. App. A2; PSR ¶ 9. Petitioner also showed the undercover officer his AK-47 rifle and a large cache of ammunition. Pet. App. A2; PSR ¶ 9. In December 2010, petitioner acquired a .22 caliber semiautomatic assault rifle and a .45 caliber semiautomatic handgun. Pet. App. A2; PSR ¶ 10. Throughout 2011, petitioner's comments about using violence to advance his cause escalated. PSR ¶ 15. He discussed various attacks he might plan on targets in Minnesota, including attacks "against individuals identified as 'liberals'"; attacks against

"progressive bookstores"; and an attack on the Mexican consulate in St. Paul in May 2012. PSR ¶ 16.

In April 2012, law-enforcement authorities arrested petitioner. Pet. App. A2. At the time of his arrest, he admitted that he possessed an AK-47 rifle and a .22 caliber semiautomatic handgun. PSR ¶ 17.

3. Petitioner was indicted in the United States District Court for the District of Minnesota on four counts of possession of a firearm by a convicted felon and two counts of possession of ammunition by a convicted felon, all in violation of 18 U.S.C. 922(g)(1). Indictment 1-6. The government contended that the ACCA applies to petitioner. The ACCA provides for a mandatory minimum sentence of 15 years of imprisonment for any defendant convicted of being a felon in possession of a firearm who has "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). It defines a "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The government argued that petitioner has at least three prior convictions that qualify as "violent felon[ies]." Indictment 1-6; see PSR ¶ 34.

Petitioner pleaded guilty to one count of possession of a firearm by a convicted felon in exchange for the dismissal of the other counts of the indictment. Pet. App. A3. In his plea agreement, petitioner reserved the right to "challenge the applicability of the ACCA." *Ibid.* (quoting agreement).

At sentencing, the district court concluded that three of petitioner's prior Minnesota convictions—for robbery, attempted robbery, and, as relevant here, unlawful possession of a short-barreled shotgun—qualify as violent felonies under the ACCA. See Pet. App. A4. The court therefore sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. *Id.* at B2-B3.

4. The court of appeals affirmed. Pet. App. A1-A7. The court held that the unlawful possession of a short-barreled shotgun is a "violent felony" under the ACCA because the offense "involves conduct that presents a serious potential risk of physical injury to another." *Id.* at A5-A6 (quoting 18 U.S.C. 924(e)(2)(B)(ii)). The court of appeals relied on its prior decision in *United States* v. *Lillard*, 685 F.3d 773 (2012), cert. denied 133 S. Ct. 1242 (2013), which had explained that "[s]hort shotguns are inherently dangerous because they are not useful except for violent and criminal purposes." *Id.* at 776-777 (internal citations and quotation marks omitted).

SUMMARY OF ARGUMENT

The ACCA defines "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). To

determine whether an offense falls under the "residual clause" of that definition, a court must ascertain "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James* v. *United States*, 550 U.S. 192, 208 (2007). Petitioner's conviction for unlawful possession of a short-barreled shotgun meets that standard.

A. In the ordinary case, unlawful possession of a short-barreled shotgun presents a tremendous risk of physical injury to other people. That conclusion follows from two propositions long recognized by this Court, lower courts, Congress, and state legislatures.

First, short-barreled shotguns are "weapons not typically possessed by law-abiding citizens for lawful purposes." *District of Columbia* v. *Heller*, 554 U.S. 570, 625 (2008). Rather, in the ordinary case, a short-barreled shotgun is possessed in connection with criminal activity, such as bank robbery, drug dealing, gang violence, or terrorism. And even if that were in doubt, it is beyond question that the ordinary case of *unlawful* possession, which excludes individuals who have registered the weapon with the federal government, is possession in connection with serious crimes. That is the basic premise of the NFA and parallel state laws.

Second, when an individual possesses an exceptionally dangerous yet concealable firearm during the commission of a crime, the chance that an ensuing confrontation—with victims, bystanders, rivals, or the police—will result in death or serious injury increases significantly. A short-barreled shotgun is a readily concealable, easily maneuvered firearm capable of inflicting catastrophic injury in close quarters and wounding multiple victims with each pull of the trig-

ger. The heightened risk posed by the weapon in criminal encounters is the very reason that Congress has imposed enhanced penalties on those who bring short-barreled shotguns to drug deals and violent crimes. 18 U.S.C. 924(c)(1)(B)(i). That risk of violent confrontation and deadly injuries is comparable to the risks posed by the enumerated offenses.

B. Petitioner errs in contending that possession offenses are categorically excluded from the residual clause, no matter how lethal the object possessed. His principal argument—that possession itself is not violent—misunderstands the residual clause and this Court's cases. The relevant question is whether the offense conduct, in the ordinary case, gives rise to a serious potential risk of physical injury. That requires a practical analysis of the circumstances and behavior that ordinarily attend the offense; the mere fact that the offense can be completed without a potential risk of violence does not remove it from the ambit of the residual clause. See *James*, 550 U.S. at 208. Here, the ordinary case is the possession of a short-barreled shotgun in connection with criminal activity, and such possession invariably increases the chance that someone will be maimed or killed in a confrontation.

Petitioner also argues that because none of the enumerated offenses is a possession offense, no possession offense falls under the residual clause. This Court rejected a structurally identical argument in holding that attempted burglary qualifies despite the fact that no enumerated offense is an attempt offense. See *James*, 550 U.S. at 199-200. Petitioner is likewise wrong in contending that the classification of certain possession offenses as violent felonies renders super-

fluous the inclusion of the unlawful "use of explosives" among the enumerated offenses. That generic offense covers the unlawful use of all explosives, including ordinary industrial explosives like TNT, whereas the residual clause encompasses the unlawful possession of particularly dangerous explosives—*i.e.*, those regulated by the NFA because they are designed as weapons.

C. This Court has indicated that "strict liability, negligence, and recklessness crimes" may not fall under the residual clause even if they present a serious potential risk of physical injury to another. *Sykes* v. *United States*, 131 S. Ct. 2267, 2275-2276 (2011). Unlawful possession of a short-barreled shotgun under Minnesota law is not such a crime, so this case presents no occasion to consider how far that "addition to the statutory text" extends. *Id.* at 2275. To the extent this Court asks more broadly whether the offense is similar to the enumerated offenses in its "purposeful, violent, and aggressive" nature, *ibid.*, unlawfully arming oneself with a concealable, devastatingly dangerous weapon with no recognized lawful use fits that description if anything does.

ARGUMENT

THE UNLAWFUL POSSESSION OF A SHORT-BARRELED SHOTGUN IS A VIOLENT FELONY

The ACCA defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court has interpreted the "residual clause" of

that provision to require a "categorical approach" to ascertaining whether a particular predicate offense presents the requisite risk. *Sykes* v. *United States*, 131 S. Ct. 2267, 2272 (2011) (citation omitted). Under that approach, this Court "look[s] only to the fact of conviction and the statutory definition of the prior offense, and do[es] not generally consider the particular facts disclosed by the record of conviction." *Ibid.* (citation omitted).

Once the Court identifies the statutory definition of the predicate offense, "the proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." *James* v. *United States*, 550 U.S. 192, 208 (2007) (emphasis added). The categorical approach to the residual clause does not, in other words, "requir[e] that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *Ibid.* And the "potential risk" required is far from "metaphysical certainty." *Id.* at 207. As this Court has explained, by modifying the word "risk" with "potential," "Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty." *Id.* at 207-208.

This Court has relied principally on its own "commonsense conclusion" about whether a particular offense poses a serious potential risk of physical injury to others. *Sykes*, 131 S. Ct. at 2274. It has sought "guidance in making this determination" from the level of risk posed by the enumerated offenses of burglary, arson, extortion, and the use of explosives, *id.* at 2273, while acknowledging that "[n]othing in th

language of § 924(e)(2)(B)(ii) rules out the possibility that an offense may present 'a serious risk of physical injury to another' without presenting as great a risk as any of the enumerated offenses," *James*, 550 U.S. at 209.

Under that framework, the unlawful possession of a short-barreled shotgun creates a "serious potential risk of physical injury to another." In the ordinary case, that weapon is unlawfully possessed in connection with serious criminal activity, and its presence at the scene of a crime drastically increases the chance that someone will be seriously hurt or killed. Accordingly, petitioner's conviction qualifies as a violent felony under the ACCA.

A. An Individual's Unlawful Possession Of A Short-Barreled Shotgun Tremendously Increases The Risk That He Will Kill Or Injure Other People During A Confrontation

That the unlawful possession of a short-barreled shotgun presents a serious potential risk of physical injury to other people follows ineluctably from two propositions that have long been confirmed by this Court, lower courts, Congress, and state legislatures: *first*, that those who illegally arm themselves with a short-barreled shotgun are overwhelmingly likely to engage in criminal activity with the weapon, and *second*, that the possession of a short-barreled shotgun during the commission of a serious crime significantly increases the risk that someone will be injured or killed in a confrontation with the possessor.

1. The ordinary case of unlawful possession of a short-barreled shotgun is possession in connection with violent crimes or other serious offenses

A person who unlawfully possesses a short-barreled shotgun is likely to engage in serious, dangerous crimes with the weapon, such as armed robbery, narcotics trafficking, gang violence, terrorism, or mass violence, or to sell the weapon to others who intend to commit such offenses. For that reason, the ordinary case of unlawful possession of a short-barreled shotgun is possession in connection with violent crimes and other serious offenses.

a. Short-barreled shotguns are typically used for unlawful purposes

For eight decades, this Court and lower courts have recognized that "short-barreled shotguns" are "not typically possessed by law-abiding citizens for lawful purposes." *District of Columbia* v. *Heller*, 554 U.S. 570, 625 (2008). That understanding is correct. A short-barreled shotgun's unique combination of characteristics renders it inappropriate for lawful private uses like self-defense and hunting, but lethally effective for criminal purposes.

i. Any shotgun, regardless of barrel length, "can inflict indiscriminate carnage" in close quarters. *United States* v. *Vincent*, 575 F.3d 820, 826 (8th Cir. 2009), cert. denied, 560 U.S. 927 (2010). A short-range shotgun blast will produce a catastrophic injury that can obliterate a victim's internal organs and cause immense blood loss. See pp. 32-33, *infra*. Longer-range shots, in which the pellets separate before impact, are likely to inflict multiple wounds across the victim's body, including his eyes, and may injure multiple people. But a bank robber or a drug dealer could

not easily carry a full-length shotgun to a crime scene without being observed by law-enforcement officers or concerned members of the public or alerting victims that they should flee; a full-length shotgun is difficult to maneuver in close quarters like hallways and alleys; and a fugitive stopped on the highway would have difficulty pointing a full-length shotgun at a patrolwoman's face before she could take cover or draw her weapon.

Not so with a short-barreled shotgun. It can be tucked into an overcoat, hidden in a small bag, or stored under a car seat, much like a handgun, and then retrieved and fired in an instant. And the shorter barrel makes the weapon easier to maneuver in tight confines. A short-barreled shotgun can be fired with one hand, for example, and rapidly redirected at additional victims. It is therefore more effective than a full-length shotgun for attacking multiple targets, hitting targets while running through a building, or firing from a moving vehicle. See Fig. 2, App., *infra*, 1a (photograph of sawed-off shotgun sold to undercover officer); Fig. 3, App., *infra*, 1a (comparison of short-barreled shotgun with full-length shotgun).

In light of those advantages, this Court and lower courts have long concluded that, in the ordinary case, a short-barreled shotgun is possessed in connection with criminal activities, not lawful behavior such as home defense or hunting. Indeed, this Court has held that, precisely because the weapons are "not typically possessed by law-abiding citizens for lawful purposes," they are not among the class of arms encompassed by the Second Amendment. *Heller*, 554 U.S. at 625. Echoing that view, the majority of courts of appeals with criminal jurisdiction have determined

that "[s]awed-off shotguns are inherently dangerous and lack usefulness except for violent and criminal purposes." *Vincent*, 575 F.3d at 825; cf. *James*, 550 U.S. at 204 & n.3.[7]

As this Court explained in *Heller*, a short-barreled shotgun is not designed for self-defense. 554 U.S. at 624-625. A homeowner does not need a concealable shotgun to protect her family and property. Unlike pistols and long guns, such weapons have never been in common use for personal defense by law-abiding citizens. Likewise, "[p]eople do not shorten their shotguns to hunt or shoot skeet." *United States* v. *Upton*, 512 F.3d 394, 404 (7th Cir.), cert. denied, 555

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[7] See *United States* v. *Fortes*, 141 F.3d 1, 6-8 (1st Cir.), cert. denied, 524 U.S. 961 (1998); *United States* v. *Ruggles*, 70 F.3d 262, 266 (2d Cir. 1995), cert. denied, 516 U.S. 1182 (1996); *United States* v. *Reed*, 935 F.2d 641, 643 (4th Cir.) (per curiam), cert. denied, 502 U.S. 960 (1991); *United States* v. *Serna*, 309 F.3d 859, 863-864 (5th Cir. 2002), cert. denied, 537 U.S. 1221 (2003); *United States* v. *Brazeau*, 237 F.3d 842, 844-845 (7th Cir. 2001); *United States* v. *Dunn*, 946 F.2d 615, 621 (9th Cir.), cert. denied, 502 U.S. 950 (1991); *United States* v. *McGill*, 618 F.3d 1273, 1275 n.4, 1277-1279 & n.8 (11th Cir. 2010) (per curiam); see also *United States* v. *Mobley*, 956 F.2d 450, 453-454 (3d Cir. 1992) ("Altered firearms, for example sawed-off shotguns, have few legitimate uses, and have most probably been altered to conceal or magnify their deadly potential.") (internal citation and quotation marks omitted); *United States* v. *Truitt*, 521 F.2d 1174, 1177 (6th Cir. 1975) ("[I]ts lawful possession is, in ordinary experience, rare indeed. There is very little legitimate use for such a weapon."); *United States* v. *Naugle*, 997 F.2d 819, 823 (10th Cir.) ("Although sawed-off shotguns may be legally possessed, that is the rare case."), cert. denied, 510 U.S. 997 (1993); *United States* v. *Mayo*, 498 F.2d 713, 718 (D.C. Cir. 1974) ("[A] sawed-off shotgun is a highly dangerous weapon, the possession of which would rarely be an innocent act."); accord, *e.g.*, *Commonwealth* v. *Alvarado*, 693 N.E.2d 131, 134 (Mass. 1998).

U.S. 830 (2008), overruled on other grounds by *United States* v. *Miller*, 721 F.3d 435 (7th Cir. 2013). As one National Rifle Association expert put it, "[y]ou don't shoot game from a car." *People* v. *Cortez*, 442 N.Y.S.2d 873, 875 (N.Y. Sup. Ct. 1981).

Rather, an individual shortens a barrel in order to convert the weapon from a tool designed for killing game in unpopulated, natural settings, to an implement intended for indiscriminate murder, maiming, and intimidation on urban streets and in buildings. For that reason, this Court has attributed to the ownership of a short-barreled shotgun the same "quasi-suspect character" as the ownership of grenades, machineguns, and artillery pieces, in that any reasonable person would know that they are not ordinary weapons fit for civilian use. *Staples* v. *United States*, 511 U.S. 600, 611-612 (1994).

Short-barreled shotguns do have legitimate roles in law enforcement and warfare. During armed raids, officers or soldiers can use them to blow the locks off doors, allowing others to rush in. See *Army Field Manual* 3.06-11, § 3-20 (Feb. 28, 2002) (describing shotgun breach techniques); see, *e.g.*, Remington Model 870 Police Breacher System (11.5-inch barrel).[8] In fact, it appears likely that a substantial number of federally registered short-barreled shotguns are registered to state and local law-enforcement agencies.[9]

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[8] www.remingtonle.com/shotguns/870breacher.htm.

[9] According to the ATF's internal records, of the approximately 140,000 short-barreled shotguns federally registered through July 2014 (some of which may have been destroyed since they were registered), nearly 86,000 were registered using ATF Form 5, which pertains to certain tax-exempt transfers. The most common Form 5 tax-exempt transfer is from a federally licensed manufac-

Shotguns can also be an important tool in military combat. See Swearengen v. But private citizens do not execute search warrants, capture fugitives, or battle insurgents.

ii. The longstanding judicial view that short-barreled shotguns are primarily weapons of crime comports with decades of federal and state legislation. Congress enacted the NFA in 1934 because it was concerned with the "growing frequency of crimes of violence in which people are killed or injured" with short-barreled shotguns and machineguns. NFA House Report 1; see NFA Senate Report 1-2. Congress believed that "there is no reason why anyone except a law officer should" possess those weapons. NFA House Report 1; see NFA Senate Report 2. As the United States explained in defending the constitutionality of the NFA's application to short-barreled shotguns shortly after its enactment, "[t]he firearms referred to in the National Firearms Act, i. e., sawed-off shotguns, sawed-off rifles, and machine guns, clearly have no legitimate use in the hands of private individuals but, on the contrary, frequently constitute the arsenal of the gangster and the desperado." U.S.

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turer, dealer, or importer to a governmental entity. See 26 U.S.C. 5852(a), 5853(a); 27 C.F.R. 479.89, 479.90. That form is also used, however, to transfer firearms *from* governmental entities to others, to transfer unserviceable curios, and to transfer weapons to a lawful heir, so the exact number of weapons registered to governmental entities under Form 5 is not clear. In addition, approximately 8750 weapons were registered using Form 10, which applies only to governmental entities who acquire short-barreled shotguns through forfeiture, abandonment, and other means. And almost 13,000 short-barreled shotguns are registered under Form 2 or Form 3, which apply only to federally licensed manufacturers, dealers, and importers.

Br. at 5, *United States* v. *Miller*, 307 U.S. 174 (1939) (No. 696).

Legislation enacted after the original NFA continued to embody the view that short-barreled shotguns are primarily weapons of crime. In 1952, Congress expanded the NFA to apply to individuals who personally convert a full shotgun into a short-barreled shotgun. See Act of May 21, 1952, ch. 320, § 1, 66 Stat. 87 (26 U.S.C. 2734 (1952)). In closing that loophole in the original statute, Congress reaffirmed that "machine guns and sawed-off guns" are "the type of firearms commonly used by the gangster element." S. Rep. No. 1495, 82d Cong., 2d Sess. 1 (1952). Indeed, the congressional committee reports explained that by 1952, "the sawed-off shotgun ha[d] become the favorite offensive weapon of such criminals," in part because they could make the "vicious weapons" at home. *Id.* at 2; see H.R. Rep. No. 1714, 82d Cong., 2d Sess. 1-2 (1952) (same); see also S. Rep. No. 1622, 83d Cong., 2d Sess. 558 (1954) (describing "double-barrel sawed-off shotgun" as a "gangster-type gun"). And in enacting the National Firearms Act Amendments of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1226, Congress continued to recognize that the "National Firearms Act covers gangster-type weapons such as * * * sawed-off shotguns." H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 34 (1968). The Congress that enacted the ACCA's residual clause 18 years later surely understood the intrinsic association between short-barreled shotguns and criminal activity. See Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207-39.

Likewise, the 39 state legislatures that have fortified the federal scheme with state-level prohibitions

imposing significant prison time have undoubtedly "recogni[zed] that persons who possess [short-barreled shotguns] are ordinarily persons who intend to use them in violent and dangerous enterprises." *People* v. *Satchell*, 489 P.2d 1361, 1371 (Cal. 1971) (en banc) (discussing legislative purpose of California ban), overruled on other grounds by *People* v. *Flood*, 957 P.2d 869 (Cal. 1998); see *People* v. *Williams*, 915 N.E.2d 815, 820 (Ill. App. Ct. 2009) ("The legislature has determined that * * * sawed-off shotguns are so inherently dangerous to human life that they constitute a sufficient hazard to society to justify their prohibition. * * * [T]hey are deemed to be contraband *per se*, having no legitimate purpose."), appeal denied, 924 N.E.2d 460 (Ill. 2010) (Tbl.). Although petitioner touts Michigan's recent statutory amendment, which permits possession of a federally registered weapon, it is revealing that the legislature still believed the weapons sufficiently dangerous in 2014 to impose up to a five-year sentence for unlawful possession. Mich. Comp. Laws Ann. § 750.224b(2) (West Supp. 2014). And the Minnesota statute of conviction here was enacted because the legislature concluded that "[t]he sawed-off shotgun has no legitimate use in the society whatsoever[;] [i]t's not used for hunting[;] [i]t's not used for marksmanship; [i]t's simply a weapon of crime." *State* v. *Ellenberger*, 543 N.W.2d 673, 676 (Minn. Ct. App. 1996) (citation omitted).

b. Individuals who take possession of short-barreled shotguns in violation of law are overwhelmingly likely to intend to use the weapons in crime

Even if this Court, lower courts, Congress, and state legislatures have all been mistaken that short-barreled shotguns are "not typically possessed by law-

abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, it is not subject to doubt that short-barreled shotguns possessed *unlawfully* are typically possessed in connection with other unlawful activity. And that is the relevant comparison for ACCA purposes, because lawful possession does not result in a felony conviction.

i. As petitioner explains, the majority of States permit the possession of a short-barreled shotgun if it is registered in accordance with NFA requirements. See notes 4-6, *supra*. That registration process requires a criminal background check and the submission of fingerprints and a picture verified by a state or local official. See pp. 5-7, *supra*. Some States, like Minnesota, prohibit the possession of short-barreled shotguns altogether (with exceptions for law-enforcement officers). In those States, the weapon cannot be lawfully registered with the federal government, and a registered weapon may not be transferred into the State from elsewhere. Thus, it is very unlikely that a person who possesses a short-barreled shotgun in conformity with federal registration requirements would be convicted of a state possession offense.

Accordingly, in assessing the likelihood that the *unlawful* possession of a short-barreled shotgun will occur in connection with serious criminal activity, a court must exclude all individuals who have disclosed their identity to the government, submitted to a criminal background check, and received approval of their application. That includes state and local law-enforcement officers as well as collectors and enthusiasts who lawfully build personal collections of firearms.

The remaining individuals are those who have taken possession of a short-barreled shotgun without disclosing their photograph and fingerprints to the government and without submitting to a criminal background check, or those who have elected to make or take possession of the weapon despite the fact that their registration applications were denied—which would happen if, for example, they are felons. The members of that cohort are overwhelming likely to possess the weapon in connection with criminal activities. Ordinary collectors and enthusiasts do not stockpile firearms illegally—particularly a class of "quasi-suspect" arms that any lawful dealer or manufacturer knows must be registered with the government before it can be sold. *Staples*, 511 U.S. at 611-612. Even the few who believe that a short-barreled shotgun is appropriate for self-defense or hunting are likely to acquire or make the weapon in compliance with law. See *United States* v. *Dunn*, 946 F.2d 615, 621 (9th Cir. 1991), cert. denied, 502 U.S. 950 (1991). It is primarily wrongdoers who will assume possession of the weapon illegally.

That is, in fact, the central logic behind the NFA's criminal prohibitions. As Attorney General Cummings told Congress in advocating for passage of the law, the basic "point" of the statute is that criminals, unlike law-abiding citizens, are not likely "to comply with this law" because one would not "expect the underworld to be going around giving their fingerprints and getting permits to carry these weapons." *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means*, 73d Cong., 2d Sess. 22 (1934). The statute, in other words, rests on the "reasonabl[e] presum[ption] that a person found in

possession of an unregistered machinegun or sawed-off shotgun intend[s] to use it for criminal purposes." *Staples*, 511 U.S. at 627 (Stevens, J., dissenting). For the ACCA analysis, that means that those who *unlawfully* possess short-barreled shotguns are particularly likely to possess the weapon for use in criminal activities.

That does not mean that the possession of any weapon in violation of law is likely to occur in connection with criminal activities. As this Court made clear in *Staples*, unlike "certain categories of guns" such as "machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation," other types of firearms have "traditionally been widely accepted as lawful possessions." 511 U.S. at 611-612. Possession of those sorts of traditional self-defense and hunting weapons may be restricted to certain persons because of potential risks of misuse, see *Barrett* v. *United States*, 423 U.S. 212, 218 (1976), and may be subject to state licensing regimes. But the violation of such requirements does not inherently and obviously suggest a criminal design.[10] In contrast,

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[10] In *United States* v. *Doe*, 960 F.2d 221 (1st Cir. 1992), the First Circuit, in an opinion by then-Chief Judge Breyer, held that possession of a firearm by a felon does not qualify as a "violent felony" under the ACCA. The court explained that it is difficult "to imagine [the requisite] risk of physical harm often accompanying the conduct that normally constitutes firearm possession." *Id.* at 224-225. For the reasons discussed above, the conduct that normally attends possession of a short-barreled shotgun significantly differs from the conduct that normally attends possession of firearms in common use for lawful purposes like self-defense and hunting. Moreover, *Doe* placed weight on the Sentencing Commission's judgment to exclude felon-in-possession crimes from its parallel definition of "crimes of violence," *id.* at 225, but the Sentencing

short-barreled shotguns have long been predominantly associated with law-breaking and violence and are pervasively regulated precisely because of their inherent danger. Because of the gun's intrinsic connection to acts of violence and intimidation, its unlawful possession is a powerful indication that the possessor intends to use it in connection with criminal activity.

ii. Petitioner draws a different conclusion from the NFA's registration scheme and parallel state statutes. According to him, that legislative approach indicates that legislators do not believe that short-barreled shotguns are particularly dangerous, since otherwise they would have "prohibit[ed] [them] outright." Pet. Br. 9.

That contention ignores the longstanding view of legislatures and courts that these weapons have no ordinary private uses other than crime. See pp. 19-24, *supra*. The fact that Congress and many States have adopted an approach that allows individuals to possess short-barreled shotguns (or, for that matter, grenade launchers and artillery pieces) if properly registered does not reflect the view that the weapons have legitimate private uses. Rather, it shows that Congress and the States believe that the steps required for registration, including the submission of a photograph and fingerprints, sufficiently mitigate the risk that a registrant will use the weapon to commit a crime. That tailored approach only makes it more likely that those who *unlawfully* possess short-barreled shotguns intend to use them for illegal ends.

Commission has determined that possession of a short-barreled shotgun is a crime of violence. See p. 35, *infra*.

c. Petitioner has provided no reason to doubt the traditional view that short-barreled shotguns are primarily implements of crime

Petitioner offers no empirical support for his contention that the traditional association between short-barreled shotguns and crime is "based upon dated beliefs about their use by 'gangsters.'" See Pet. Br. 16, 39-42.

i. Petitioner acknowledges that nationwide statistics specific to short-barreled shotguns do not exist. But he believes that the fact that handguns are the most commonly employed weapon in violent crime undermines the traditional view of short-barreled shotguns. See Pet. Br. 37-39. That does not follow. Ordinary handguns "traditionally have been widely accepted as lawful possessions," *Staples*, 511 U.S. at 612, and are not subject to the NFA's pervasive regulation. They are therefore far more readily available. It is thus no wonder that they are used in more crimes than short-barreled shotguns—or machineguns, grenade launchers, or rockets. That does not support the view that short-barreled shotguns are typically used for lawful purposes. Under petitioner's reasoning, possession of ordinary explosives would be deemed more closely associated with terrorism than possession of a biological weapon because terrorists more often detonate bombs than engage in bioterrorism.

If anything, the fact that crimes involving short-barreled shotguns are not as common as crimes involving handguns demonstrates that the NFA and other laws are working to prevent criminals from taking possession of these inherently dangerous weapons. But that success should not lead to the conclusion that the weapons are now benign.

ii. Aside from his reliance on handgun statistics, petitioner cites (Br. 21 & n.5) cases in which a person was prosecuted for unlawful possession of a short-barreled shotgun that was "possessed at home or in a closet or a locked gun cabinet" to suggest that the weapon is not uniquely associated with crime. Of course, criminals do not carry their weapons at all times, so it is no surprise that the police often find them in house searches. But in any event, the cases that petitioner has identified only verify the intrinsic connection between short-barreled shotguns and crime. In one case, the defendant stole the weapon from his mother's boyfriend, put on a black mask, and robbed a man at gunpoint, threatening to "do you here." *State* v. *Beavers*, 912 A.2d 1105, 1107-1108 (Conn. App. Ct.), certification denied, 918 A.2d 276 (Conn. 2007). In another, the police found a sawed-off shotgun when they arrested the defendant for a prior assault. See *People* v. *Etcheverry*, 347 N.E.2d 654, 655-656 (N.Y. 1976). It is telling that these are among the most sympathetic examples of unlawful possession of a short-barreled shotgun that petitioner has located.[11]

Petitioner has, in fact, cited only a single case involving a non-criminal use of a short-barreled shotgun.[12] In *United States* v. *Hammond*, No. 90-30333,

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[11] One case petitioner cites was a civil action, see *Boston Hous. Auth.* v. *Guirola*, 575 N.E.2d 1100, 1101 (Mass. 1991), and the other resulted in an acquittal on the possession counts, see *State* v. *Guerra*, 562 N.W.2d 10, 12 (Minn. Ct. App. 1997). Neither is relevant to the typical criminal conviction.

[12] *United States* v. *White Buffalo*, 10 F.3d 575, 576 (8th Cir. 1993) (cited Pet. Br. 40), involved a short-barreled .22 caliber rifle, not a short-barreled shotgun.

1991 WL 103450 (9th Cir. June 11, 1991), the defendant, who lived in "a cedar log cabin without electricity in the rural woods of Idaho," claimed that he had used the weapon "to kill a number of grouse for eating." *Id.* at *1 (cited Pet. Br. 40). There is no reason to believe that a backwoodsman's grouse-hunting represents the typical case of possession of a short-barreled shotgun. See note 14, *infra* (citing examples of the weapon's use from reported decisions). Rather, the typical offender looks more like petitioner: a violent felon who sought to stockpile a cache of dangerous weapons and planned to use them to intimidate and terrorize others. See PSR ¶¶ 4-18, 40-46.

2. The possession of a short-barreled shotgun in the commission of a crime significantly increases the risk that somebody will be seriously hurt or killed

For the foregoing reasons, "in the ordinary case," *James*, 550 U.S. at 208, a short-barreled shotgun is unlawfully possessed for use in a crime—as an implement of assault, intimidation, protection, and evasion from arrest. Accordingly, in assessing whether the offense "presents a serious potential risk of physical injury to another," the "proper inquiry" is whether *that* sort of possession presents a serious potential risk that someone will be physically injured. *Ibid.* It does.

a. Short-barreled shotguns are lethally dangerous when possessed during criminal confrontations

The presence of a short-barreled shotgun at the scene of a crime significantly increases the chance that someone will be hurt or killed.

i. The unique combination of characteristics of a short-barreled shotgun make it an inherently danger-

ous weapon likely to cause serious injury and death when wielded in criminal confrontations.

First, short-barreled shotguns pack the same devastating impact as ordinary shotguns. When fired "[a]t close range, the shotgun is the most formidable and destructive of all small arms." Di Maio 182; see *Ellenberger*, 543 N.W.2d at 677 ("[A]t short range, a sawed-off shotgun is probably at least as vicious as a machine gun.") (quoting legislative history of Minnesota statute). "No other weapon, military or civilian, fires a single round that launches a swarm of submissiles toward an intended target." Swearengen v. Contact and close-range shots—in which the pellets remain clumped together as they enter the body—can "result in pulpification of organs" due to the immense gas pressure released. Di Maio 199. Shots fired within nine feet of the victim "usually cause massive local destruction." Wilson 153-154. As the range increases, and the pellets enter the body separately, the "wounds produced will resemble those from a low-velocity handgun bullet"—that is, the victim will be in essence struck with multiple low-velocity bullets at once. Di Maio 199-200; see Fig. 1, App., *infra*, 1a. Part of the reason for the devastating effect of short-barreled shotguns is that "[u]nlike rifle bullets * * * shotgun pellets rarely exit the body," with the result that "all the kinetic energy is transferred to the body as wounding effects." Di Maio 183.

At greater distances, a single shotgun blast has the potential to hit multiple victims, whether intended or not, and to be accurate in hitting a moving target even if the shooter lacks great aim. According to one study, when fired from 30 yards away, the shot spread will range between 27 and 44 inches, depending on the

choke. Brian J. Heard, *Handbook of Firearms and Ballistics: Examining and Interpreting Forensic Evidence* 176 (1997) (Heard). Even at very long distances, where the pellets have lost substantial velocity, a significant chance still exists that a person's eye will be hit by a pellet—over 50% at 15 to 40 yards away. See William F. Varr III, *Shotgun Eye Injuries: Ocular Risk and Eye Protection Efficacy*, 99 Ophthamology 869 (June 1992).[13] In short, "[n]o other weapon can demonstrate a first-round hit probability and a single-round lethality that even approaches that possessed by the shotgun." Swearengen v.

Second, the concealability of a short-barreled shotgun makes it less likely that targets, bystanders, or security personnel will notice that an individual has carried a shotgun into a building or to the scene of a criminal transaction. Intended victims may not know to take cover or run away until it is too late. Rivals or Good Samaritans are more likely to confront the possessor if they do not know that he has a powerful weapon concealed in his coat or bag. Thus, the weapon's size as compared to a similarly powerful full-length shotgun increases the risk that its possession during criminal activity will result in death or injury.

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[13] Many believe that a short-barreled shotgun produces a wider spread of shot than a regular shotgun. Some studies examining that issue have found such an effect, while others have produced inconclusive results or found no effect. See, *e.g.*, Heard 177; Michael S. Ward et al., *Sawed-off Shotgun, the Effect of Barrel Length on Shot Pattern Size*, 45 AFTE Journal 40 (Winter 2013); Di Maio 203. Removing the choke on a shotgun increases the spread. See *Cortez*, 442 N.Y.S.2d at 875. But because the choke is located at the muzzle end of the barrel, removing the choke does not necessarily mean that the modified weapon would be short enough to meet the NFA's definition of a "firearm."

Third, the fact that a short-barreled shotgun can be more easily aimed and handled than a larger gun, and is lighter to carry, increases the chance that a shooter will be able to hit multiple targets in close quarters. It also enables the possessor to do other things—drive a car, open a door, hold a bag of drugs, or call a getaway car on his cell phone—while brandishing or firing. That increases the chance that the possessor will fire off more rounds during a confrontation.

ii. The unique danger posed by short-barreled shotguns—immense lethality combined with concealabilty and maneveurability—is recognized in the text of the NFA. In addition to short-barreled shotguns and rifles, machineguns, and other highly dangerous arms and explosives, the NFA applies to any other weapon "capable of being concealed on the person from which a shot can be discharged through the energy of an explosive" (excluding rifled pistols and revolvers) and any smooth-bored pistol or revolver designed to fire a shotgun shell. 26 U.S.C. 5845(a) and (e); see NFA § 1(a), 48 Stat. 1236. That catchall category is designed to capture weapons with the same signature characteristics of short-barreled shotguns even if they otherwise fall outside the statutory definition. That demonstrates Congress's determination that packing the explosive power of a shotgun into an easily concealable weapon poses a special danger that neither ordinary shotguns nor ordinary handguns do.

The same legislative judgment is reflected in the Crime Control Act of 1990, which amended 18 U.S.C. 924(c) to subject individuals to heightened penalties when they bring a short-barreled shotgun to a drug deal or a violent crime. Section 924(c) generally prohibits the use or carrying of a firearm during and in

relation to a violent crime or drug-trafficking offense (and, as amended in 1998, a firearm's possession in furtherance of such a crime). The provision's "basic purpose" is "to combat the 'dangerous combination' of 'drugs [or violent crimes] and guns.'" *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998) (citation omitted). The 1990 amendment doubled the penalty—ten years instead of five years—"if the firearm possessed by a person convicted of a violation of this section * * * is a * * * short-barreled shotgun" (among other weapons). 18 U.S.C. 924(c)(1)(A) and (B)(i). That additional penalty embodies the view that combining a short-barreled shotgun with serious criminal activity presents an even greater risk of violence than other armed offenses.

iii. The Sentencing Commission has also concluded that the possession of a short-barreled shotgun creates a serious potential risk of physical injury. The Commission has determined that the term "crime of violence" under the career offender guideline, which has nearly the same definition as "violent felony" under the ACCA, includes the possession of a short-barreled shotgun or another firearm covered by the NFA. See Sentencing Guidelines App. C, Amend. 674 (effective Nov. 1, 2004); see Sentencing Guidelines § 4B1.2, comment. (n.1). Given that "'[t]he Commission, which collects detailed sentencing data on virtually every federal criminal case, is better able than any individual court to make an informed judgment about the relation between' a particular offense and 'the likelihood of accompanying violence,'" that determination is "further evidence" that the offense poses an inherent risk of violence. *James*, 550 U.S. at

206-207 (quoting *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.)).

iv. As petitioner acknowledges (Br. 37), empirical studies quantifying the risk of serious injury or death created by the presence of a short-barreled shotgun at the scene of a crime do not exist. But any objective review of innumerable reported incidents in which the weapon has been possessed in the commission of crimes confirms the longstanding view of Congress and the courts that the weapon is inherently dangerous in a way that ordinary firearms are not: Short-barreled shotguns can impose catastrophic injury at close range, can hit multiple people with sprays of shot, including unintended bystanders, and can be easily concealed and rapidly redirected.

The special lethality of the weapon is illustrated in everyday criminal prosecutions in state and federal courts involving the infliction of horrific close-range wounds, the injury or killing of multiple individuals in rapid succession, accidental or unplanned shootings in the course of confrontations, and deadly attacks on police officers.[14] The weapon has also been employed

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[14] See, *e.g.*, *State* v. *Meikle*, 79 A.3d 129, 131 (Conn. App. Ct. 2013) (per curiam); *Fisher* v. *State*, 359 S.W.3d 113, 115-117 (Mo. Ct. App. 2011); *Hammond* v. *Hall*, 586 F.3d 1289, 1297-1298, 1301-1302, 1304, 1310-1311 (11th Cir. 2009), cert. denied, 131 S. Ct. 917 (2011); *Lewis* v. *Curry*, No. C 06-1727, 2008 WL 2128139, at *1 (N.D. Cal. May 20, 2008); *People* v. *Barbosa*, No. F051824, 2008 WL 1961158, at *2-*3 (Cal. Ct. App. May 7, 2008); *Murray* v. *Schriro*, No. CV-99-1812, 2008 WL 1701404, at *28 (D. Ariz. 2008), aff'd, 745 F.3d 984 (9th Cir. 2014); *People* v. *Thompson*, 853 N.E.2d 378, 382-385 (Ill. 2006), cert. denied, 549 U.S. 1254 (2007); *State* v. *Carter*, 114 S.W.3d 895, 899, 901 (Tenn. 2003), cert. denied, 541 U.S. 1221 (2004); *Dennis* v. *Mitchell*, 354 F.3d 511, 515 (6th Cir. 2003), cert. denied, 541 U.S. 1068 (2004); *States* v. *Trevino*, 980

in some of the most notorious instances of mass violence in recent memory. In preparing for their attack on Columbine High School, Dylan Klebold and Eric Harris personally "sawed the barrels off [two] shotguns for concealment" and loaded them with buckshot. Dave Cullen, *Columbine* 33 (2009) (Cullen); see *The Report of Governor Bill Owens' Columbine Review Commission* 23 n.58 (May 2001) (*Columbine Report*);[15] see also Tom Kenworthy, USA Today, *Video Shows Columbine Gunmen Laughing During Target Practice* (Oct. 22, 2003) (reproducing photograph of Klebold with sawed-off shotgun).[16] As they approached the school, they hid the shotguns from the view of students and teachers in duffel bags. Cullen 46; see *Columbine Report* 26. And last year, a mentally disturbed man concealed in a backpack a Remington 870 shotgun that he had personally cut down with a hacksaw, walked past security at the Washington Navy Yard, and murdered twelve people. See FBI, *Photo Gallery: Navy Yard Shootings*;[17] Metropolitan

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P.2d 552, 554-555 (Idaho 1999); *People* v. *Hope*, 658 N.E.2d 391, 395 (Ill. 1995), cert. denied, 517 U.S. 1223 (1996); *State* v. *Rose*, 548 A.2d 1058, 1065-1066 (N.J. 1988); *State* v. *Fusak*, No. 86-2093-CR, 1987 WL 267599, at *1-*3 (Wis. Ct. App.), review denied, 416 N.W.2d 297 (1987); *People* v. *Walker*, 483 N.E.2d 301, 303 (Ill. App. Ct. 1985); *Williams* v. *Maggio*, 679 F.2d 381, 383 (5th Cir. 1982), cert. denied, 463 U.S. 1214 (1983); *State* v. *Amerson*, 518 S.W.2d 29, 30-31 (Mo. 1975).

[15] www.state.co.us/columbine/Columbine_20Report_WEB.pdf.

[16] http://usatoday30.usatoday.com/news/nation/2003-10-22-columbine-gunmen_x.htm.

[17] www.fbi.gov/news/navy-yard-shootings-investigation/image/photo-gallery-navy-yard-shootings.

Police Dept., *After Action Report, Washington Navy Yard, September 16, 2013*, at 9 (July 2014).[18]

Petitioner is thus wrong in asserting that the widespread belief among Americans that short-barreled shotguns are especially dangerous is outdated and exaggerated. They are terribly dangerous. Given the physical characteristics of the weapon, the countless examples of its use in case law and news reports, and the serious concerns that have led generations of lawmakers to regulate them pervasively, it is inarguable that their possession during a criminal encounter substantially increases the chance of death or grievous physical injury.

b. The risk posed by short-barreled shotguns is similar to the risks posed by the enumerated offenses

In determining whether an offense qualifies as a "violent felony" under the ACCA's residual clause, this Court has sought guidance in the level and kind of risk posed by the enumerated offenses. In *Sykes*, for example, the Court analyzed the types of risk presented by arson and burglary and found that they were similar, in a general sense, to the risk posed by vehicular flight from an officer. Like arson, the Court explained, vehicular flight demonstrates "a lack of concern for the safety of property and persons of pedestrians and other drivers" and creates the risk that officers will "use force to bring [the driver] within their custody." 131 S. Ct. at 2273. Likewise, the Court found that vehicular flight is similar to burglary in its likelihood of provoking a violent confrontation,

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[18] http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20AAR_Navy%20Yard_07-11-14.pdf.

because the act "dares, and in a typical case requires, the officer to give chase." *Ibid.*

The illegal possession of a short-barreled shotgun presents those risks—the danger of a violent confrontation and the disregard for the safety of others—to an even greater degree. It also presents a risk similar to extortion because the weapon's mere presence conveys an implicit threat of violence.

i. As discussed, in the typical case of *unlawful* possession of a short-barreled shotgun, the weapon is intended for use in criminal activity, as a means of assault or intimidation. When serious criminal activity is afoot, a risk of confrontation—with targets, bystanders, rivals, or law-enforcement officers—is always a possibility; indeed, it is often the purpose of the offense. And for the reasons discussed above, when one person is armed with a concealable, immensely destructive weapon, the possibility that the confrontation will turn deadly increases tremendously.

Even where the possessor is not observed committing an offense with the weapon, because of the grave threat that a short-barreled shotgun poses to public safety, officers who observe a person in possession of that weapon, or receive a report that a person has one illegally, will often "deem themselves duty bound" to approach the individual and attempt to disarm him. *Sykes*, 131 S. Ct. at 2273. That confrontation will be fraught with the potential for serious violence to a far greater extent than the average burglary arrest because the suspect will be armed with an inherently dangerous weapon capable of quickly ending the lives of multiple officers.

In assessing the risk posed by a particular offense, moreover, this Court has focused on the individuals

actually *convicted* of the crime. In *James*, in considering the offense of attempted burglary, the Court explained that the "ACCA only concerns that subset of attempted burglaries where the offender has been apprehended, prosecuted, and convicted." 550 U.S. at 204. The Court explained that the attempted burglaries that result in convictions would "typically occur when the attempt is thwarted by some outside intervenor." *Ibid.*

Here, possessors of short-barreled shotguns who are actually convicted of the offense are especially likely to have engaged in a confrontation with police or others at a time when they were holding the weapon or had it close at hand, either in the course of using it to commit a crime or during a home or vehicle search. Such offenders may or may not be "significantly more likely than others to attack" police when confronted. *Chambers* v. *United States*, 555 U.S. 122, 128-129 (2009). But if they do choose to resist, they have at their disposal the means to inflict horrific harm on the duty-bound officers.

ii. The possession of a short-barreled shotgun, like arson and the illegal use of explosives, also demonstrates an extreme disregard for the safety and well-being of other people because of its destructive potential. As courts have long recognized, equipping oneself with that weapon rather than more conventional means of self-defense demonstrates a willingness to inflict "indiscriminate carnage" in the event of a confrontation. *Vincent*, 575 F.3d at 826. And even the accidental discharge of a shotgun can have far more devastating consequences than a misfired pistol.

Although statistics specific to short-barreled shotguns do not exist, shotguns as a class, when used in

crimes, have caused far more deaths and injuries than arson and the use of explosives combined. See *Sykes*, 131 S. Ct. at 2274-2275. From 2008 through 2012, shotguns were used to commit 1896 homicides in the United States. See FBI, *Expanded Homicide Data Table 8* (2012).[19] By comparison, 31 victims were killed with explosives and 422 were killed with fire during the same time frame. *Ibid.* And in 2012, explosives and fire offenses resulted in up to 404 injuries, while offenses involving shotguns resulted in over 1100. FBI, *Type of Injury by Type of Weapons/Force Involved* (2012).[20]

iii. While none of the enumerated offenses precisely corresponds to unlawful possession of a short-barreled shotgun, the offense poses dangers similar to that of extortion, which, even defined unduly narrowly, includes the serious risk of physical injury created by a threat of violence to the victim's person or property and the possibility that ignoring the threat will provoke an attack. See *Begay* v. *United States*, 553 U.S. 137, 145 (2008); see also *James*, 550 U.S. at 208-210 (providing example of extortion through nonviolent blackmail and stating that narrower interpretation seems "entirely novel"). A similarly menacing message is conveyed to a victim, gang rivals, law-enforcement officers, and the public at large by an individual's unlawful possession of a short-barreled shotgun, which is "an ominous threat in and [of] it-

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[19] www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2008-2012.xls.

[20] http://www.fbi.gov/about-us/cjis/ucr/nibrs/2012/table-pdfs/type-of-injury-by-type-of-weapon-force-involved-2012.

self." *United States* v. *McKinney*, 477 F.2d 1184, 1186 (D.C. Cir. 1973) (per curiam).

Even if petitioner were correct that the popular imagination has exaggerated the danger of the weapon, he does not deny that it is "notoriously associated * * * with crime," such that anyone "who watches television or reads newspapers would know the reputation of the weapon." *United States* v. *Shaw*, 670 F.3d 360, 368-369 (1st Cir. 2012) (Boudin, J., concurring). Unlike firearms "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, the possession of a short-barreled shotgun contains an implicit threat of violence, as extortion often does, backed up by an exceptionally violent means of carrying it out.

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The "ordinary case" of the unlawful possession of a short-barreled shotgun is possession in connection with serious crimes, and such possession amplifies the risk that someone will be killed or grievously wounded in a confrontation with the possessor. That risk is substantial; it is comparable to the risks posed by the enumerated offenses; and it has been recognized and acted upon by the Nation's elected representatives for decades.

B. The ACCA's Residual Clause Does Not Categorically Exclude Possession Offenses

Petitioner' principal argument, made in three different ways, is that the ACCA's residual clause inherently excludes possession offenses. See Pet. Br. 15-25, 29-42. That argument rests on a significant misunderstanding of this Court's decisions interpreting the ACCA's residual clause and should be rejected.

1. Petitioner first argues that "[b]y its very nature, the crime of possessing a short-barreled weapon requires possession and nothing more" and does not require that the "shotgun be used in or possessed during another crime." Pet. Br. 19, 21. It is true that the elements required to complete the offense of possession of a short-barreled shotgun do not *necessitate* a risk of physical injury. But the same is true of burglary, arson, extortion, and the unlawful use of explosives. There is no requirement, for example, that an extortionist follow through on a threat. The statute's focus is risk, not inevitability. For that reason, the "proper inquiry" under the residual clause is "whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another," not whether it always does. *James*, 550 U.S. at 208 (emphasis added).

Petitioner's basic error is his contention that, in assessing risk, a court may not consider "what additional conduct might occur" beyond the actions necessary to satisfy the elements of the offense. Pet. Br. 19; see Pet. Br. 44 (discussing similar reasoning of Sixth Circuit). Consideration of what additional conduct might attend the offense—a confrontation between a homeowner and an attempted burglar, for example, or the accidental death of a pedestrian during a vehicular flight—is the principal thrust of the residual-clause risk analysis. Tellingly, none of the cases that petitioner relies on for his argument involved the residual clause. See *id.* at 19-20 (citing *Taylor* v. *United States*, 495 U.S. 575, 600-601 (1990); *Johnson* v. *United States*, 559 U.S. 133, 137 (2010); and *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013)). Those cases establish only that to determine whether a state-law offense

meets the generic definition of an enumerated offense (*e.g.*, burglary), or has a particular element under clause (i) of Section 924(e)(2)(B), a court "must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 20 (quoting *Moncrieffe*, 133 S. Ct. at 1684) (citation and internal quotation marks omitted).

But the residual clause demands a different analysis. A court must conduct a practical assessment of whether the conduct involved in the commission of the state-law offense typically entails a potential risk of violence, which in turn requires consideration of the circumstances and behavior that ordinarily attend the offense. See *James*, 550 U.S. at 207-209. Contrary to petitioner's evident understanding, a court need not find that "every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *Id.* at 208. Thus, as the Court explained in *James* in the context of attempted burglary, "[o]ne could, of course, imagine a situation in which attempted burglary might not pose a realistic risk of confrontation or injury to another—for example, a break-in of an unoccupied structure located far off the beaten path and away from any potential intervenors." *Id.* at 207. But the mere fact that the offense could, as a logical matter, be committed in a non-risky way does not remove it from the ambit of the residual clause if it ordinarily creates a serious potential risk of injury.

For the reasons discussed above, in the ordinary case the unlawful possession of a short-barreled shotgun is committed in connection with serious crimes,

where the weapon serves to intimidate victims through the threat of catastrophic injury and is concealed to avoid detection by the authorities and members of the public. A person who unlawfully takes possession of a short-barreled shotgun is likely to use it in multiple crimes, and the risk that it will eventually contribute to violence is quite high.

2. Petitioner next argues that "the enumerated offenses all involve active felonies and none criminalizes mere possession of an object" and therefore that "[p]ossession is so unlike these action-based felonies that it cannot be described as 'similar in kind.'" Pet. Br. 22. This Court rejected a structurally identical argument in *James*. The defendant there argued that the ACCA "categorically exclude[s] attempt offenses from the scope of the residual provision" because "the 'common attribute' of the offenses specifically enumerated in clause (ii) * * * is that they are all completed offenses." 550 U.S. at 198-199. The Court explained, however, that "the most relevant common attribute of the enumerated offenses of burglary, arson, extortion, and explosives use * * * is that all of these offenses, while not technically crimes against the person, nevertheless create significant risks of bodily injury or confrontation that might result in bodily injury." *Ibid.*

That analysis defeats petitioner's argument that the absence of an expressly enumerated possession offense means that possession offenses are categorically excluded from the residual clause. As this Court has made clear, a predicate crime need not be precisely similar to the enumerated crimes across every conceivable dimension, but instead generally need only be "*similar in risk* to the listed crimes." *Sykes*, 131

S. Ct. at 2276 (emphasis added); see *Chambers*, 555 U.S. at 128-129; *James*, 550 U.S. at 199-200; accord *Begay*, 553 U.S. at 150-153 (Scalia, J., concurring in the judgment). The whole purpose of the clause is to capture offenses that are different from the enumerated offenses except insofar as they present a similar risk. For the reasons discussed above, the unlawful possession of a short-barreled shotgun is similar in risk to the enumerated crimes.

This Court has imposed one extra-textual limitation on the residual clause: that at least some offenses "akin to strict liability, negligence, and recklessness" crimes are not covered. *Sykes*, 131 S. Ct. at 2276. For the reasons discussed in Section C below, that limitation does not apply here. And it would be inadvisable to establish any new extra-textual limitation on the residual clause for offenses that are not, in petitioner's terminology, sufficiently "action-based." Pet. Br. 22. Shielding recidivist felons who illegally equip themselves with inherently dangerous firearms from the ACCA's heightened penalties, on the ground that they were arrested before they could use the weapons, would frustrate the statute's basic purpose of keeping weapons out of the hands of dangerous people.[21]

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[21] Amici curiae contend that possession does not involve "conduct" within the meaning of the residual clause. See Br. of Gun Owners of Am., Inc. et al. 8-9. Possession requires action to exercise dominion over an object, either actually or constructively, such as by exercising exclusive control over the area where the object is located. See *State* v. *Denison*, 607 N.W.2d 796, 799-800 (Minn. Ct. App. 2000). Congress would likely be surprised to learn that the numerous federal possession offenses, such as possession of a controlled substance with intent to distribute it, involve no conduct whatsoever. See *Moncrieffe*, 133 S. Ct. at 1685 (discussing "conduct criminalized" by federal possession offense).

3. Finally, petitioner argues that if possession of a short-barreled shotgun qualifies as a violent felony under the residual clause, it "would functionally erase the term 'use' from the phrase 'use of explosives'" in the enumerated crimes. Pet. Br. 24. Petitioner's argument rests on an erroneous premise: that if the unlawful possession of a short-barreled shotgun is a violent felony, then the unlawful possession of *any* explosive would also qualify as a violent felony. That does not logically follow from the government's position, just as it does not follow that the unlawful possession of *any* firearm is a violent felony, see pp. 27-28, *supra*. Rather, what distinguishes short-barreled shotguns, as well as the types of explosives covered by the NFA, from other firearms and explosives is that they are inherently dangerous and are principally used by private citizens for criminal activities. The NFA expressly excludes from its definition of "destructive device" "any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; * * * or any other device which the Secretary finds is not likely to be used as a weapon." 26 U.S.C. 5845(f).

The unlawful possession of explosives that fall outside the NFA's definition of destructive devices—*i.e.*, those explosives not designed primarily for use as a weapon—would not necessarily be encompassed by the ACCA's residual clause. The reason that short-barreled shotguns are covered by that clause is that they are weapons primarily designed for criminal use, and so in the ordinary case their possession creates a serious potential risk of physical injury. That analysis

would not apply to explosives with lawful industrial uses, such as TNT, even though an individual might unlawfully possess those explosives by failing to comply with regulatory requirements. See *e.g.*, Cal. Health & Safety Code §§ 12000 *et seq.*; cf. 18 U.S.C. 841(c) and (d), 842 (federal licensing requirements for dealing, importing, and manufacturing "explosive materials").

In contrast, the enumerated offense of the unlawful "use of explosives" includes the illegal use of *any* explosives, even those with ordinary commercial and industrial applications. Thus, no redundancy is created by interpreting the residual clause to encompass the possession of particularly dangerous firearms and explosive weaponry.

C. The Unlawful Possession Of A Short-Barreled Shotgun Under Minnesota Law Is Not A Strict-Liability, Negligence, Or Recklessness Crime

In *Begay*, *supra*, this Court concluded that some offenses that may fall within the plain terms of the ACCA's residual clause because of the risk they pose nevertheless should be excluded from its scope because they are "simply too unlike the provision's listed examples for us to believe that Congress intended the provision to cover [them]." 553 U.S. at 142. That limitation has no application here.

1. *Begay* held that drunk driving is not a violent felony under the ACCA. 553 U.S. at 139. The Court concluded that to fall under the ACCA's residual clause, an offense must involve "purposeful, violent, and aggressive conduct." *Id.* at 145. It explained that each of the enumerated offenses involves that kind of conduct and that "such crimes are characteristic of the armed career criminal, the eponym of the statute."

Id. at 144-145 (citation and internal quotation marks omitted). Because drunk-driving offenses "are, or are most nearly comparable to, crimes that impose strict liability, [thereby] criminalizing conduct in respect to which the offender need not have had any criminal intent at all," the Court held that such offenses did not meet the "purposeful, violent, and aggressive" requirement. *Id.* at 145.

In *Sykes*, *supra*, this Court explained that the "purposeful, violent, and aggressive" formulation is "an addition to the statutory text," which expressly speaks only in terms of the risk posed by an offense. 131 S. Ct. at 2275. The Court further explained that the "formulation was used in [*Begay*] to explain the result" in a case that "involved a crime akin to strict liability, negligence, and recklessness crimes." *Id.* at 2276. In contrast, the crime at issue in *Sykes*, vehicular flight from officers, required that "[v]iolators * * * act 'knowingly or intentionally,'" which this Court described as "a stringent *mens rea* requirement." *Id.* at 2275 (citation omitted). The Court therefore found that it was "not a strict liability, negligence, or recklessness crime." *Id.* at 2276. Because the crime was "similar in risk to the listed crimes," the Court held that it fell within the residual clause without inquiring whether it otherwise could be deemed "purposeful, violent, and aggressive." *Id.* at 2275-2276.

Thus, although *Sykes* "did not overrule *Begay*" (Pet. Br. 18 n.4), it clarified that the "purposeful, violent, and aggressive" criterion is limited to offenses lacking a degree of *mens rea*. Here, the unlawful possession of a short-barreled shotgun under Minnesota law is not akin to a "strict liability, negligence, or

recklessness" crime. The Minnesota statute of conviction prohibits "own[ing], possess[ing], or operat[ing] * * * a short-barreled shotgun," without specifying a level of *mens rea*. Minn. Stat. Ann. § 609.67(2) (West 2009). In *State* v. *Ndikum*, 815 N.W.2d 816 (Minn. 2012), the Minnesota Supreme Court interpreted a similar offense (possession of a pistol in public, Minn. Stat. Ann. § 624.714(1a) (West 2009)), to require the government to prove that the defendant knew that he possessed a pistol. 815 N.W.2d at 822. In so holding, it closely followed this Court's analysis in *Staples*, *supra*, which held that knowledge of the characteristics of a machinegun is an element of the NFA possession offense, 26 U.S.C. 5861(d), despite the statute's failure to specify a *mens rea*. Echoing *Staples*'s reasoning, the Minnesota Supreme Court concluded that "[b]ased on the strength of the common law rule requiring a mens rea element in every crime, * * * statutory silence is typically insufficient to dispense with mens rea." 815 N.W.2d at 818.[22] And it found significant that the offense carried a "felony-level punishment," which was "simply incompatible with the theory" that it should be deemed a strict-liability offense. *Id.* at 822.

Given those principles, there is little question that the statute of conviction here, which is also silent as to *mens rea* and carries felony-level punishment (up to five years in prison), requires that the defendant knew that he possessed a short-barreled shotgun. That is the conclusion reached by the one Minnesota appellate court to consider the question, which explained that the statute requires that the defendant "*knowingly*

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[22] Petitioner thus errs (Br. 31) as a matter of Minnesota law in drawing the opposite inference from the statute's silence.

possessed the sawed-off shotgun." *State* v. *Salyers*, 842 N.W.2d 28, 34-35 (Minn. Ct. App. 2014) (emphasis added) (citing *Ndikum*'s *mens rea* holding).

Petitioner does not dispute that conclusion. But he contends (Pet. 30-32) that in 2007, when he was convicted, the offense was "almost certainly * * * essentially one of strict liability." Petitioner does not point to any judicial interpretation of the statute suggesting that it was a strict-liability crime at the time of his conviction. Because he pleaded guilty to the possession offense, see PSR ¶ 45, there can be no claim that the jury was misinstructed on the knowledge element, and in any event an error in jury instructions would not be relevant under the categorical approach. Petitioner relies (Br. 32) on the omission of the knowledge element in pattern jury instructions in 2007. In Minnesota courts, however, "jury instruction guides are instructive, but not precedential or binding." *State* v. *Kelley*, 734 N.W.2d 689, 695 (Minn. Ct. App. 2007).

Accordingly, unlike a strict-liability, negligence, or recklessness offense, the Minnesota statute of conviction contains the "conventional *mens rea* element" for statutory crimes. *Staples*, 511 U.S. at 605.

2. In any event, even if knowledge of the characteristics of the weapon were not required, that would not take the offense outside the scope of the ACCA's residual clause. A state legislature could reasonably conclude that the length of a barrel is such a visually apparent feature of a weapon that the government should not be required to prove beyond a reasonable doubt that a possessor had the requisite knowledge. Particularly given that it is "hardly onerous" for an individual to "measur[e] the length of the barrel[]" of

an obviously short shotgun to ensure that it meets legal requirements, a state legislature could sensibly find it inequitable for "'the owner of a sawed-off shotgun to be criminally liable if he knew its barrel was 17.5 inches long but not if he mistakenly believed the same gun had an 18–inch barrel.'" *State* v. *Watterson*, 679 S.E.2d 897, 903-904 (N.C. Ct. App. 2009) (quoting *Staples*, 511 U.S. at 634 (Stevens, J., dissenting)).

That legislative judgment would not make the offense akin to a strict-liability offense in the same sense as drunk driving. Conviction would still require proof that the defendant was "aware of [the sawed-off shotgun's] presence and [had] both the power and intent to control its disposition or use." *Watterson*, 679 S.E.2d at 900 (emphases omitted; brackets in original). The *Begay* formulation was crafted in an effort to discern "a prior crime's relevance to the possibility of future danger with a gun," 553 U.S. at 146, and possession of a short-barreled shotgun bears a high relevance to future danger even if the state legislature has chosen to presume knowledge of barrel length. The offense of intentionally arming oneself with a dangerous weapon should not be excluded from the ACCA's ambit simply to account for the remote case in which an unwitting felon honestly believed that an obviously short weapon met legal requirements.

3. As discussed, *Sykes* clarified that *Begay*'s formulation was meant to exclude offenses akin to strict-liability, negligence, and recklessness crimes. But even if this Court were to inquire into whether the unlawful possession of a short-barreled shotgun is "purposeful, violent, and aggressive" in some broader sense, the offense would qualify as a violent felony. It is not the sort of crime "that involves risk of injury

but not aggression or violence." *Sykes*, 131 S. Ct. at 2289 n.1 (Kagan, J., dissenting). The risk presented is that a confrontation will occur in the course of the possession and that the possessor of the short-barreled shotgun will use it against another human being. And even putting aside that basic risk of actual violence, the possession of a weapon used predominantly for violent purposes is inherently aggressive, conveying an implicit threat of violence to anyone who encounters the possessor. See pp. 41-42, *supra*. In petitioner's phrasing, the act of unlawfully equipping oneself with a short-barreled shotgun or another inherently dangerous weapon is at least as "intentional and provocative" as attempted burglary or vehicular flight. Pet. Br. 14-15.

Petitioner argues (Br. 25-29) that the unlawful possession of a short-barreled shotgun is different in kind from the enumerated offenses because the conduct is lawful in most States if conducted in conformity with regulatory requirements. That argument rests on the erroneous premise that all of the enumerated offenses concern conduct that is "*per se* criminalized." *Id.* at 29. The use of explosives is pervasively regulated by States and municipalities, and the same detonation may be lawful or unlawful depending on whether a person has obtained regulatory permission. See, *e.g.*, Cal. Health & Safety Code §§ 12000 *et seq.*; Fla. Stat. Ann. §§ 552.081 *et seq.*; N.Y. Lab. Law §§ 450 *et seq.*; Ohio Rev. Code Ann. §§ 2923.11(K)(3), 2923.17, 2923.18 (LexisNexis 2010 & Supp. 2014); Tex. Loc. Gov't Code Ann. §§ 235.001 *et seq.* But context matters. A person who uses explosives without permission, or equips himself with a short-barreled shotgun, artillery piece, or grenade launcher without regulato-

ry approval, is very differently positioned than the person who has properly notified authorities about what he is doing.

In short, it is difficult to believe that Congress would have been more concerned with the felon who had committed three burglaries than the felon who had illegally armed himself with a concealable firearm that has no recognized lawful use for private citizens, but that is extremely effective at killing and maiming human beings. As between the two, the latter is more clearly "the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 553 U.S. at 146.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2014

APPENDIX

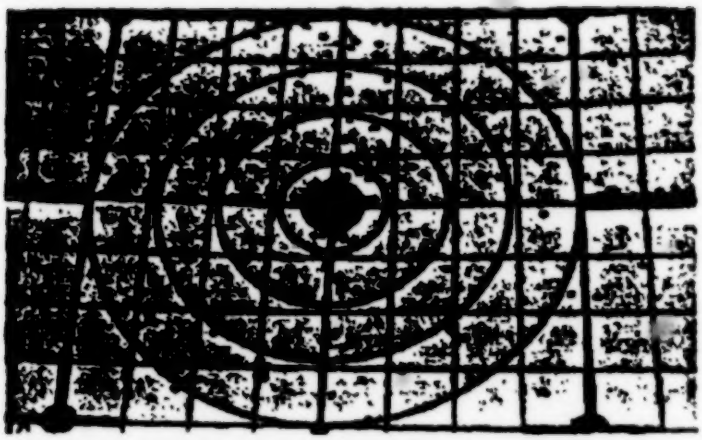

Figure 1: Shot spread patterns of birdshot from 30 feet. See Kyle Wintersteen. *Buckshot vs. Birdshot*. Shooting Illustrated Magazine (Nov. 15. 2012). http://www.shootingillustrated.com/article.php?id=26973.

Figure 2: Sawed-off shotgun purchased by undercover officer. Pretrial Memo. in Supp. of Detention. Docket entry No. 4. Ex. B. *United States* v. *Lupoi et al.*. No. 14-cr-42 (E.D.N.Y. Feb. 11. 2014).

Figure 3: Full-length shotgun compared with short-barreled shotgun. (ATF file photo.)

1. 18 U.S.C. 922 provides in pertinent part:

Unlawful acts

(a) It shall be unlawful—

* * * * *

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity;

* * * * *

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the li-

censee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his rec-

ords, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Attorney General.

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

(*o*)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

* * * * *

2. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who,

during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or prop-

erty of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

3. 26 U.S.C. 5812 provides:

Transfers

(a) Application

A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form;

(3) the transferee is identified in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; and (6) the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

(b) Transfer of possession

The transferee of a firearm shall not take possession of the firearm unless the Secretary has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

4. 26 U.S.C. 5822 provides:

Making

No person shall make a firearm unless he has (a) filed with the Secretary a written application, in duplicate, to make and register the firearm on the form prescribed by the Secretary; (b) paid any tax payable on the making and such payment is evidenced by the proper stamp affixed to the original application form; (c) identified the firearm to be made in the application form in such manner as the Secretary may by regulations prescribe; (d) identified himself in the application

form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; and (e) obtained the approval of the Secretary to make and register the firearm and the application form shows such approval. Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.

5. 26 U.S.C. 5841 provides:

Registration of firearms

(a) Central registry

The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include—

(1) identification of the firearm;

(2) date of registration; and

(3) identification and address of person entitled to possession of the firearm.

(b) By whom registered

Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered

Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) Firearms registered on effective date of this Act

A person shown as possessing a firearm by the records maintained by the Secretary pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968[2] shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

(e) Proof of registration

A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary upon request.

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[2] So in original. See References in Text notes below.

6. 26 U.S.C. 5845 provides:

Definitions

For the purpose of this chapter—

(a) Firearm

The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(b) Machinegun

The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts de-

signed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

(c) Rifle

The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

(d) Shotgun

The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.

(e) Any other weapon

The term "any other weapon" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in

length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

(f) Destructive device

The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the

Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

(g) Antique firearm

The term "antique firearm" means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(h) Unserviceable firearm

The term "unserviceable firearm" means a firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition.

(i) Make

The term "make", and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

(j) Transfer

The term "transfer" and the various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of.

(k) Dealer

The term "dealer" means any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing, or loaning firearms and shall include pawnbrokers who accept firearms as collateral for loans.

***(l)* Importer**

The term "importer" means any person who is engaged in the business of importing or bringing firearms into the United States.

(m) Manufacturer

The term "manufacturer" means any person who is engaged in the business of manufacturing firearms.

7. 27 C.F.R. 478.28 provides:

Transportation of destructive devices and certain firearms.

(a) The Director may authorize a person to transport in interstate or foreign commerce any destructive device, machine gun, short-barreled shotgun, or short-barreled rifle, if he finds that such transportation is reasonably necessary and is consistent with public safety and applicable State and local law. A person

who desires to transport in interstate or foreign commerce any such device or weapon shall submit a written request so to do, in duplicate, to the Director. The request shall contain:

(1) A complete description and identification of the device or weapon to be transported;

(2) A statement whether such transportation involves a transfer of title;

(3) The need for such transportation;

(4) The approximate date such transportation is to take place;

(5) The present location of such device or weapon and the place to which it is to be transported;

(6) The mode of transportation to be used (including, if by common or contract carrier, the name and address of such carrier); and

(7) Evidence that the transportation or possession of such device or weapon is not inconsistent with the laws at the place of destination.

(b) No person shall transport any destructive device, machine gun, short-barreled shotgun, or short-barreled rifle in interstate or foreign commerce under the provisions of this section until he has received specific authorization so to do from the Director. Authorization granted under this section does not carry or import relief from any other statutory or regulatory provision relating to firearms.

(c) This section shall not be construed as requiring licensees to obtain authorization to transport destruc-

tive devices, machine guns, short-barreled shotguns, and short-barreled rifles in interstate or foreign commerce: *Provided*, That in the case of a licensed importer, licensed manufacturer, or licensed dealer, such a licensee is qualified under the National Firearms Act (see also Part 479 of this chapter) and this part to engage in the business with respect to the device or weapon to be transported, and that in the case of a licensed collector, the device or weapon to be transported is a curio or relic.

8. 27 C.F.R. 479.62 provides:

Application to make.

No person shall make a firearm unless the person has filed with the Director a written application on Form 1 (Firearms), Application to Make and Register a Firearm, in duplicate, executed under the penalties of perjury, to make and register the firearm and has received the approval of the Director to make the firearm which approval shall effectuate registration of the weapon to the applicant. The application shall identify the firearm to be made by serial number, type, model, caliber or gauge, length of barrel, other marks of identification, and the name and address of original manufacturer (if the applicant is not the original manufacturer). The applicant must be identified on the Form 1 (Firearms) by name and address and, if other than a natural person, the name and address of the principal officer or authorized representative and the employer identification number and, if an individual, the identification must include the date and place of

birth and the information prescribed in § 479.63. Each applicant shall identify the Federal firearms license and special (occupational) tax stamp issued to the applicant, if any. The applicant shall also show required information evidencing that making or possession of the firearm would not be in violation of law. If the making is taxable, a remittance in the amount of $200 shall be submitted with the application in accordance with the instructions on the form. If the making is taxable and the application is approved, the Director will affix a National Firearms Act stamp to the original application in the space provided therefor and properly cancel the stamp (see § 479.67). The approved application will be returned to the applicant. If the making of the firearm is tax exempt under this part, an explanation of the basis of the exemption shall be attached to the Form 1 (Firearms).

9. 27 C.F.R. 479.63 provides:

Identification of applicant.

If the applicant is an individual, the applicant shall securely attach to each copy of the Form 1 (Firearms), in the space provided on the form, a photograph of the applicant 2 x 2 inches in size, clearly showing a full front view of the features of the applicant with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application. The applicant shall attach two properly completed FBI Forms FD-258 (Fingerprint Card) to the application. The fingerprints must be clear for

accurate classification and should be taken by someone properly equipped to take them. A certificate of the local chief of police, sheriff of the county, head of the State police, State or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, shall be completed on each copy of the Form 1 (Firearms). The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that possession of the firearm by the maker would be in violation of State or local law or that the maker will use the firearm for other than lawful purposes.

10. 27 C.F.R. 479.64 provides:

Procedure for approval of application.

The application to make a firearm, Form 1 (Firearms), must be forwarded directly, in duplicate, by the maker of the firearm to the Director in accordance with the instructions on the form. The Director will consider the application for approval or disapproval. If the application is approved, the Director will return the original thereof to the maker of the firearm and retain the duplicate. Upon receipt of the approved application, the maker is authorized to make the firearm described therein. The maker of the firearm shall not, under any circumstances, make the firearm until the application, satisfactorily executed, has been forwarded to the Director and has been approved and returned by the Director with the National Firearms

Act stamp affixed. If the application is disapproved, the original Form 1 (Firearms) and the remittance submitted by the applicant for the purchase of the stamp will be returned to the applicant with the reason for disapproval stated on the form.

11. 27 C.F.R. 479.65 provides:

Denial of application.

An application to make a firearm shall not be approved by the Director if the making or possession of the firearm would place the person making the firearm in violation of law.

12. 27 C.F.R. 479.84 provides:

Application to transfer.

Except as otherwise provided in this subpart, no firearm may be transferred in the United States unless an application, Form 4 (Firearms), Application for Transfer and Registration of Firearm, in duplicate, executed under the penalties of perjury to transfer the firearm and register it to the transferee has been filed with and approved by the Director. The application, Form 4 (Firearms), shall be filed by the transferor and shall identify the firearm to be transferred by type; serial number; name and address of the manufacturer and importer, if known; model; caliber, gauge or size; in the case of a short-barreled shotgun or a short-barreled rifle, the length of the barrel; in the case of a weapon made from a rifle or shotgun, the overall length of the weapon and the length of the barrel; and

any other identifying marks on the firearm. In the event the firearm does not bear a serial number, the applicant shall obtain a serial number from the Regional director (compliance) and shall stamp (impress) or otherwise conspicuously place such serial number on the firearm in a manner not susceptible of being readily obliterated, altered or removed. The application, Form 4 (Firearms), shall identify the transferor by name and address; shall identify the transferor's Federal firearms license and special (occupational) Chapter tax stamp, if any; and if the transferor is other than a natural person, shall show the title or status of the person executing the application. The application also shall identify the transferee by name and address, and, if the transferee is a natural person not qualified as a manufacturer, importer or dealer under this part, he shall be further identified in the manner prescribed in § 479.85. The application also shall identify the special (occupational) tax stamp and Federal firearms license of the transferee, if any. Any tax payable on the transfer must be represented by an adhesive stamp of proper denomination being affixed to the application, Form 4 (Firearms), properly cancelled.

13. 27 C.F.R. 479.85 provides:

Identification of transferee.

If the transferee is an individual, such person shall securely attach to each copy of the application, Form 4 (Firearms), in the space provided on the form, a photograph of the applicant 2 x 2 inches in size, clearly

showing a full front view of the features of the applicant with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application. The transferee shall attach two properly completed FBI Forms FD–258 (Fingerprint Card) to the application. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. A certificate of the local chief of police, sheriff of the county, head of the State police, State or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, shall be completed on each copy of the Form 4 (Firearms). The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that the receipt or possession of the firearm would place the transferee in violation of State or local law or that the transferee will use the firearm for other than lawful purposes.

14. 27 C.F.R. 479.86 provides:

Action on application.

The Director will consider a completed and properly executed application, Form 4 (Firearms), to transfer a firearm. If the application is approved, the Director will affix the appropriate National Firearms Act stamp, cancel it, and return the original application showing approval to the transferor who may then

transfer the firearm to the transferee along with the approved application. The approval of an application, Form 4 (Firearms), by the Director will effectuate registration of the firearm to the transferee. The transferee shall not take possession of a firearm until the application, Form 4 (Firearms), for the transfer filed by the transferor has been approved by the Director and registration of the firearm is effectuated to the transferee. The transferee shall retain the approved application as proof that the firearm described therein is registered to the transferee, and shall make the approved Form 4 (Firearms) available to any ATF officer on request. If the application, Form 4 (Firearms), to transfer a firearm is disapproved by the Director, the original application and the remittance for purchase of the stamp will be returned to the transferor with reasons for the disapproval stated on the application. An application, Form 4 (Firearms), to transfer a firearm shall be denied if the transfer, receipt, or possession of a firearm would place the transferee in violation of law. In addition to any other records checks that may be conducted to determine whether the transfer, receipt, or possession of a firearm would place the transferee in violation of law, the Director shall contact the National Instant Criminal Background Check System.

15. 27 C.F.R. 479.101 provides:

Registration of firearms.

(a) The Director shall maintain a central registry of all firearms in the United States which are not in the

possession of or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record and shall include:

(1) Identification of the firearm as required by this part;

(2) Date of registration; and

(3) Identification and address of person entitled to possession of the firearm as required by this part.

(b) Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes in the manner prescribed by this part. Each firearm transferred shall be registered to the transferee by the transferor in the manner prescribed by this part. No firearm may be registered by a person unlawfully in possession of the firearm except during an amnesty period established under section 207 of the Gun Control Act of 1968 (82 Stat. 1235).

(c) A person shown as possessing firearms by the records maintained by the Director pursuant to the National Firearms Act (26 U.S.C. Chapter 53) in force on October 31, 1968, shall be considered to have registered the firearms in his possession which are disclosed by that record as being in his possession on October 31, 1968.

(d) The National Firearms Registration and Transfer Record shall include firearms registered to the possessors thereof under the provisions of section 207 of the Gun Control Act of 1968.

(e) A person possessing a firearm registered to him shall retain proof of registration which shall be made available to any ATF officer upon request.

(f) A firearm not identified as required by this part shall not be registered.

16. Minn. Stat. § 609.67 (2007) provides:

MACHINE GUNS AND SHORT-BARRELED SHOTGUNS.

Subdivision 1. **Definitions.** (a) "Machine gun" means any firearm designed to discharge, or capable of discharging automatically more than once by a single function of the trigger.

(b) "Shotgun" means a weapon designed, redesigned, made or remade which is intended to be fired from the shoulder and uses the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(c) "Short-barreled shotgun" means a shotgun having one or more barrels less than 18 inches in length and any weapon made from a shotgun if such weapon as modified has an overall length less than 26 inches.

(d) "Trigger activator" means a removable manual or power driven trigger activating device constructed and designed so that, when attached to a firearm, the rate at which the trigger may be pulled increases and the rate of fire of the firearm increases to that of a machine gun.

(e) "Machine gun conversion kit" means any part or combination of parts designed and intended for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled, but does not include a spare or replacement part for a machine gun that is possessed lawfully under section 609.67, subdivision 3.

Subd. 2. **Acts prohibited.** Except as otherwise provided herein, whoever owns, possesses, or operates a machine gun, any trigger activator or machine gun conversion kit, or a short-barreled shotgun may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Subd. 3. **Uses permitted.** The following persons may own or possess a machine gun or short-barreled shotgun provided the provisions of subdivision 4 are complied with:

(1) law enforcement officers for use in the course of their duties;

(2) chief executive officers of correctional facilities and other personnel thereof authorized by them and persons in charge of other institutions for the retention of persons convicted or accused of crime, for use in the course of their duties;

(3) persons possessing machine guns or short-barreled shotguns which, although designed as weapons, have been determined by the superintendent of the Bureau of Criminal Apprehension or the superintendent's delegate by reason of the date of manufacture, value, design or other characteristics to be pri-

marily collector's items, relics, museum pieces or objects of curiosity, ornaments or keepsakes, and are not likely to be used as weapons;

(4) manufacturers of ammunition who possess and use machine guns for the sole purpose of testing ammunition manufactured for sale to federal and state agencies or political subdivisions;

(5) dealers and manufacturers who are federally licensed to buy and sell, or manufacture machine guns or short-barreled shotguns and who either use the machine guns or short-barreled shotguns in peace officer training under courses approved by the Board of Peace Officer Standards and Training, or are engaged in the sale of machine guns or short-barreled shotguns to federal and state agencies or political subdivisions; and

(6) persons employed by the Minnesota National Guard as security guards, for use in accordance with applicable federal military regulations.

Subd. 4. **Report required.** (a) A person owning or possessing a machine gun or short-barreled shotgun as authorized by subdivision 3, clause (1), (2), (3), or (4) shall, within ten days after acquiring such ownership or possession, file a written report with the Bureau of Criminal Apprehension, showing the person's name and address; the person's official title and position, if any; a description of the machine gun or short-barreled shotgun sufficient to enable identification thereof; the purpose for which it is owned or possessed; and such further information as the bureau may reasonably require.

(b) A dealer or manufacturer owning or having a machine gun or short-barreled shotgun as authorized by subdivision 3, clause (5) shall, by the tenth day of each month, file a written report with the Bureau of Criminal Apprehension showing the name and address of the dealer or manufacturer and the serial number of each machine gun or short-barreled shotgun acquired or manufactured during the previous month.

Subd. 5. **Exceptions.** This section does not apply to members of the armed services of either the United States or the state of Minnesota for use in the course of their duties or to security guards employed by the Minnesota National Guard for use in accordance with applicable federal military regulations.

Subd. 6. **Preemption.** Laws 1977, chapter 255, supersedes all local ordinances, rules and regulations.

REPLY BRIEF

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IN THE

Supreme Court of the United States

SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ARGUMENT

I. When Analyzed Properly, With An Emphasis On Elements Instead of Speculation, Possession of a Short-Barreled Shotgun Does Not Present a Serious Potential Risk.

Samuel Johnson's 2007 conviction for possession of a short-barreled shotgun in violation of Minnesota Statute § 609.67 is not a "violent felony" under the ACCA, 18 U.S.C. § 924(e). It is an offense of mere possession that does not present a serious potential risk of physical injury to another. The government concedes that no statistics document injuries, deaths or other risks from the mere possession of short-barreled shotguns. Govt. Br. 29. Instead, the government abandons the statutory elements of the offense to argue that because such a weapon is dangerous when used in violent crimes, its simple possession is a violent felony. For several reasons, the government's argument must fail.

First, analysis of whether a particular crime is a violent felony must focus on the conviction itself, its elements, and the conduct necessarily underpinning that conviction. This Court's precedent, including decisions interpreting the residual clause specifically, requires such categorical analysis. The government untethers this Court's "ordinary case" doctrine from the necessary consideration of an offense's elements. Moreover, the government's approach, which allows a court to imagine what offenses a defendant could commit with a short-barreled shotgun, provides no meaningful limits on the definition of violent felony; this enables even plainly non-violent possession to be analyzed as though a defendant was convicted of a far more serious offense.

Applying the proper analytical framework reveals that mere possession of a short-barreled shotgun poses neither the type nor the degree of risk exemplified by the enumerated offenses, and therefore is not a violent felony.

A. This Court's Precedent Requires An Elements-Based Analysis of the Offense of Conviction.

The relevant points of comparison for determining whether a prior offense is a violent felony are the elements of the offense, not speculation about what additional conduct might occur. Pet. Br. 19-20. The government counters that the cases Petitioner relies upon for this argument do not involve the residual clause and therefore are inapposite (Govt. Br. 43-44) and further asserts that residual clause analysis permits speculation about risks beyond those posed by the offense alone. However, a close examination of the Court's precedent, including decisions interpreting the residual clause, confirms that the elements provide parameters for risk analysis. The government's use of the ordinary case doctrine must be rejected.

1. Residual Clause Analysis Focuses On the Elements.

From its first exploration of the residual clause, in *James v. United States*, 550 U.S. 192 (2007), the Court emphasized the categorical nature of the required analysis.

> [W]e next ask whether attempted burglary, as defined by Florida law, is an offense that "involves conduct that presents a serious

> potential risk of physical injury to another." In answering this question, we employ the "'categorical approach'" that this Court has taken with respect to other offenses under ACCA. That is, we consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.

James, 550 U.S. 192, 201-02 (2007) (internal citations omitted) (quoting *Shepard v. United States*, 544 U.S. 13, 17 (2005), quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)) (emphasis in the original). Examining Florida's attempted burglary statute, the Court said that "[t]he pivotal question. is whether overt conduct directed toward unlawfully entering or remaining in a dwelling, with intent to commit a felony therein, is 'conduct that presents a serious potential risk of physical injury to another.'" *James*, 550 U.S. at 203 (quoting the ACCA). In *Begay v. United States*, 553 U.S. 137, 141 (2008), the Court reiterated the elements-based nature of the residual clause assessment: "In determining whether this crime is a violent felony, we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." In short, whether this Court considers the residual clause or other parts of the ACCA's definition of violent felony, the "categorical approach" requires an examination of the offense and its elements, not unchecked speculation. Therefore, the Court's admonitions from *Johnson* and *Moncrieffe* that a reviewing court must examine the "least of th[e] acts" criminalized by the statute are relevant to

the question before the Court. *Moncreiffe*, 133 S. Ct. at 1684; *Johnson*, 559 U.S. at 137; *see also United States v. Amos*, 501 F.3d 524, 527 (6th Cir. 2007) ("[T]he Court must consider the least objectionable conduct that would violate this statute. Consequently, to qualify as a violent felony, the possession of the [short-barreled shotgun] would have to pose a serious potential risk to others even if Amos kept it as a collector's item or family heirloom, stored it in his attic, or used it to fend off groundhogs from his garden.") (internal citations omitted).

2. Risk Analysis Under the Residual Clause Does Not Permit Limitless Speculation.

The government's proposed residual clause analysis goes beyond the conduct underlying the actual elements to consider other crimes it claims (without statistical backing) "ordinarily attend the offense." Govt. Br. 44. Therefore, the government repeatedly urges the Court to presume that the "ordinary case" of possession of a short-barreled shotgun "is possession in connection with violent crimes and other serious offenses." Govt. Br. 18; *accord* Govt. Br. 17, 31, 39, 42, 44-45. In two ways, the government's analysis strays from this Court's jurisprudence: First, the government misapprehends the "ordinary case" concept, using it to justify rather than prevent significant speculation. Second, the government misconstrues the way the risk presented by an offense should be evaluated.

The phrase "ordinary case," comes from *James*, 550 U.S. at 208: "Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury

to another." Such a common-sense limitation serves to prevent imaginative attorneys from suggesting nonviolent but farfetched ways a crime can be committed, in an effort to alter a court's conclusion about whether the offense is violent.

> One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury – for example, an attempted murder where, the gun, unbeknownst to the shooter, had no bullets . . .

Id. (citation omitted) The ordinary case doctrine discourages courts from straining to imagine how the elements of an offense can be completed in a clearly anomalous way.

The government claims that Petitioner's argument regarding risk is based on speculation, rather than an ordinary case, when in fact the opposite is true. The offense of possessing a short-barreled shotgun requires possession and not more. While one can imagine awful things that could be or have been done with such a weapon, as the government does when it references Columbine, such acts are far beyond the ordinary case. It is no more appropriate for this Court to assess the risk presented by mere possession of a short-barreled shotgun by considering one of the worst crime sprees ever committed with such a weapon than it would be for the Court to conclude that an obviously violent attempted murder is not actually violent because of the imagined "empty gun scenario."[1]

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1. In *United States v. Miller*, 721 F.3d 435 (7th Cir. 2013), the court acknowledged that a short-barreled shotgun can be

In addition to misapprehending the ordinary case concept, the government attenuates the risk at issue from the underlying offense beyond what residual clause analysis permits. While this Court has weighed consequences that might follow directly from an offense, in each instance such consequences are tied to the conduct required by the statutory elements of the predicate crime. Thus, the Court has considered the risk of an encounter with a homeowner in a burglary, *see James*, 550 U.S. at 211, or the danger that one fleeing the police might hit a bystander, *Sykes v. United States*, 131 S. Ct. 2267, 2273-74 (2011). In each of these examples, the defendant's own actions in committing the offense directly generated the risk that troubled the Court. For instance, a fleeing

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possessed in a variety of circumstances, ranging from "patently violent," as when used in a robbery, to "at best latent," as when hidden at home.

> But what is the ordinary case of mere possession? We know that we are not simply to imagine the ways in which the statute can be violated with minimal risk of physical injury to others. Nor are we to hypothesize dangerous ways in which violations could occur. Instead, we are to focus on the generic crime as ordinarily committed – that is whether *most* instances of the crime present the required degree of risk.
>
> . . .
>
> [W]e are to look at the conduct required by the statute, that is, the ordinary manner of violating the law. And in the ordinary case, the possession of a short-barreled shotgun does not create any potential risks of harm to another person because all that is involved is the knowing possession of a weapon.

Miller, 721 F.3d at 439-40 (citations omitted).

defendant could kill a pedestrian despite committing no crime beyond fleeing, and the possibility of a dangerous encounter with a homeowner arises from burglary itself, even if the burglar commits no further criminal offense.

In marked contrast, the government's argument here rests on the premise that a person who unlawfully possesses a short-barreled shotgun would necessarily use such a weapon in a serious crime. Such an argument requires the defendant to commit the crime at issue, mere possession, as well as a further violent crime. Only when the defendant himself takes the additional steps imagined (committing one or more distinct and much worse crimes) does the required risk arise.

This sleight of hand goes beyond surmising what dangers arise from committing the predicate offense, to imagining what dangers arise from a wholly separate and more violent crime of which mere possession of the weapon is only a first step. Judge Gruender, dissenting from the Eighth Circuit's decision in *United States v. Vincent*, described the flaw inherent in this reasoning when applied to possession of a short-barreled shotgun.

> The core difference between criminal use and criminal possession is that use typically involves violent and aggressive conduct, while simple possession merely creates a potential for violence and aggression that is ordinarily realized only if possession ripens into use. In many instances criminal possession never ripens into criminal use and so never results in violence or aggression.

Vincent, 575 F.3d 820, 830 (8th Cir. 2009) (Gruender, J., dissenting).[2]

The government's own authority demonstrates the significant attenuation inherent in its risk analysis and its misuse of "ordinary case." At footnote 14, pages 36-37, the government lists sixteen cases spanning fifteen jurisdictions and five decades which discuss horrible crimes committed with short-barreled shotguns. However, in only two of the sixteen cases does it appear that a defendant was actually charged with or convicted of possession of a short-barreled shotgun, or any merely possessory weapons offense. *See Dennis v. Mitchell*, 354 F.3d 511 (6th Cir. 2003); *State v. Rose*, 548 A.2d 1058 (N.J. 1988). Instead, the defendants were convicted of crimes ranging from capital murder to robbery, crimes that are readily classified as violent felonies. This collection of decisions demonstrates that, if anything, when a defendant uses a short-barreled shotgun in a violent crime, he is likely to be charged with that violent crime and, thereby, treated as an Armed Career Criminal if the rest of his criminal record so requires; he is less likely to also or only be charged with possession of the weapon.[3] The

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2. *See also United States v. Doe*, 960 F.2d 221, 224 (1st Cir. 1992) (Breyer, J.) ("One can easily imagine a significant likelihood that physical harm will often accompany the very conduct that normally constitutes, say, burglary or arson. It is much harder, however, to imagine such a risk of physical harm often accompanying the conduct that normally constitutes firearm possession, for simple possession, even by a felon, takes place in a variety of ways (e.g., in a closet, in a storeroom, in a car, in a pocket) many, perhaps most, of which do not involve likely accompanying violence.")

3. Judge Gruender's dissent in *Vincent* addresses the flawed reasoning relied upon by the government. "Under the categorical

attenuation between the offense at issue (mere possession of a short-barreled shotgun) and the harm imagined by the government's analysis (use of the weapon during a violent crime) is so great that it demonstrates the unworkability of the proposed analytical framework.

B. The "Ordinary Case" of Possession Is Mere Possession.

The government's argument that the ordinary case of possession of a short-barreled shotgun involves actual use during a violent crime is largely based on two critical but flawed assumptions: first, there is no legitimate purpose for such a gun, so an evil purpose can be fairly assumed; and second, the only reason someone would unlawfully possess such a weapon (i.e., fail to register it) is because he intends to use it in a crime. Both assumptions are incorrect and provide a shaky foundation for the government's analysis.

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approach, our focus is limited to the statutory definition of the crime at hand, which forecloses a roving inquire into the totality of the circumstances associated with the crime or how the crime might be committed on a particular occasion. As a result, if the crime of possessing a sawed-off shotgun itself does not involve violent and aggressive conduct, then it makes no difference whether it is frequently discovered in connection with a *different* offense (e.g. armed robbery or brandishing a firearm) that *is* violent and aggressive." *Vincent*, 575 F.3d at 831 (Gruender, J., dissenting) (internal citations and quotations omitted). Judge Gruender noted that, when a short-barreled shotgun is used in a violent crime, that conviction would "supplant the crime of possessing a sawed-off shotgun as the relevant conviction for the purposes of applying the ACCA." *Id.*

First, it is simply untrue that there is no reason for a person to possess a short-barreled shotgun other than a nefarious intention to use it in a crime. The government's own Brief belies their assertion on this point. As they concede at footnote 9, page 21, internal records kept by the ATF demonstrate that tens of thousands of short-barreled shotguns have been registered by ordinary citizens in states across the country where such possession is legal. Such weapons are not only widely available, but are specifically marketed to law-abiding citizens as ideal self-defense weapons. Pet. Br. 40 n. 26.

It cannot be that these ordinary citizens are electing to both purchase and pay $200 to register weapons that have no valid use. Indeed, Amici Gun Owners of America, et al., describe that a short-barreled shotgun is an ideal weapon for home defense, and more useful than a traditional shotgun for smaller and less strong persons. Gun Owners Br. 18-20.

As the government mentions at least four times in its Brief, this Court noted in *District of Columbia v. Heller* that short-barreled shotguns are "not typically possessed by law-abiding citizens for lawful purposes"; admittedly, Congress presumed the same thing when it enacted the National Firearms Act (NFA). *Heller*, 554 U.S. 570, 624-25. However, Mr. Johnson urges that the Court's passing characterization of these weapons in *Heller* is unsupported by data and is called into question by a contemporary close examination like the one underway in this case; such dicta cannot bear the weight the government places on it.[4] Indeed, both the *Heller* Court and Congress in

4. Inherent in the government's reasoning is an assumption that short-barreled shotguns are significantly more dangerous

enacting the NFA were motivated in part by the short-barreled shotgun's reputation as a gangster gun. It is possible that, had the *Heller* Court been aware of the tens of thousands of law-abiding citizens who now own short-barreled shotguns, believing them to be worthy of purchase and taxation, it would have characterized the weapons differently. More critically, Mr. Johnson is not arguing that short-barreled shotguns cannot be regulated by such statutes as the NFA, nor questioning the Court's suggestion that such weapons are not clearly protected by the Second Amendment. Neither question is raised by the inquiry actually before the Court here: whether possession of such a weapon, where prohibited, is a violent felony under the ACCA.

In sum, a central premise of the government's flawed "ordinary case" analysis is the presumption that short-

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than other, less-regulated weapons. This is no longer necessarily true.

While the Columbine killers used short-barreled shotguns, other weapons (including largely unregulated assault weapons) are more commonly used in such terrible crimes. *See, e.g.*, Erica Goode, *Rifle Used in Killings, America's Most Popular, Highlights Regulation Debate*, N.Y. Times, December 16, 2012 (discussing use of AR-15 Rifle in Newtown School Shooting and two other mass shootings). Likewise, gun manufacturers have designed handguns that are not only capable of serious destruction, but look dangerous and are carefully designed to avoid the NFA's registration requirements. *See, e.g.*, http://www.sigsauer.com/CatalogProductDetails/p556-swat-pistol-with-sb15-pistol-stabilizing-brace.aspx (last visited September 14, 2014). It cannot be that the unlawful possession of a short-barreled shotgun is so much more dangerous than the unlawful possession of weapons such as these that the former is a violent felony and the latter are not.

barreled shotguns have no valid purpose, a presumption that is simply untrue.

Similarly, the government's argument that intention to use a short-barreled shotgun in a crime can be assumed from a defendant's willingness to possess it unlawfully and without proper registration (Govt. Br. 25-27) is equally unsubstantiated. It may be that people who possess short-barreled shotguns for the purpose of criminal activity do not register them, but that does not make the converse true.

There are many reasons why a person might possess an unregistered firearm. A person might fail to register such a weapon because he is unaware of the registration requirement,[5] because he does not wish to pay the hefty tax, because he is frustrated with the ATF's slow processing of registrations,[6] or because he does not want to provide the government with information about his weapons.[7] Additionally, people who are precluded from

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5. *See, e.g., United States v. Jamison*, 635 F.3d 962 (7th Cir. 2011) (noting it is no defense to possession of an unregistered short-barreled shotgun that defendant was unaware of registration requirement).

6. The ATF has recently added staff to review registration applications for short-barreled shotguns and other NFA weapons to reduce a delay in processing that averages ten months. *See* ATF Website: National Firearms Act Frequently Asked Questions: https://www.atf.gov/firearms/faq/national-firearms-act-processing-times.html (last visited September 14, 2014).

7. Many Americans, particularly those that support gun ownership, are strongly opposed to perceived efforts on the part of the federal government to create a national registry of gun owners

ownership regardless of registration, whether by virtue of their presence in one of the many classes of prohibited persons set forth at 18 U.S.C. § 922(g), or by virtue of their residence in a state that bans the weapon, would fail to register the weapon despite having no intention to possess the weapon during a crime. Indeed, the government itself acknowledges that not all acts of unlawful firearms possession are likely to occur in connection with criminal activities (Govt. Br. 27), implicitly conceding that a person might unlawfully possess a weapon but not intend to use it in a crime.[8]

In short, the government's circular reasoning argues that because short-barreled shotguns are inherently bad, only criminals possess them unlawfully, and only for use during crime. Neither facts nor reason support this tautology.

Moreover, contrary to the government's assertions, legal reporters are full of decisions addressing prosecutions of defendants who illegally possess short-barreled

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and the weapons they possess. *See, e.g.*, NRA National Member Survey, 2013: http://www.nraila.org/media/1080041/113topline.pdf (last visited September 16, 2014).

8. The government seems to concede that unlawful gun possession by a felon is not a violent felony, while continuing to argue that possession of a short-barreled shotgun, even by a non-felon, is. *See* Govt. Br. 27 & n. 10. It is difficult to reconcile the two positions given the total speculation that underpins the government's analysis in the instant case. Instead, the Court should conclude that the reasoning behind lower court rulings that being a felon in possession of a firearm is not a violent felony, such as *United States v. Doe*, 960 F.2d 221 (1st Cir. 1992), applies with equal force to the present question.

shotguns, but who do not do so during violent crimes, or even with the intention of one day committing such a crime. *See e.g., United States v. Gunter*, 504 F. App'x. 424 (6th Cir. 2012) (under mattress in mobile home); *United States v. Saska*, 533 F. App'x. 783 (9th Cir. 2013) (in bedroom ceiling); *Commonwealth v. O'Connell*, 738 N.E.2d 346 (Mass. 2000) (in house); *State v. Simpson*, 2002 WL 924459 (Ohio App. 2002) (in attic bedroom); *State v. Mason*, 2003 WL 22235309 (Wash App. 2003) (in locked gun safe); *State v. Warfield*, 80 P.3d 625 (Wash. Ct. App. 2004) (in bedroom closet); *State v. Fox*, 843 A.2d 309 (N.H. 2004) (in utility closet); *Espinoza v. State*, 2006 WL 766976 (Tex. App. 2006) (in bedroom closet); *Hirshey v. State*, 852 N.E.2d 1008 (Ind. App. 2006) (in garage cabinet); *State v. Kidd*, 562 N.W.2d 764 (Iowa 1997) (within sleeping bag in house); *Eyambe v. State*, 2013 WL 1320507 (Tex. App. 2013) (inside a safe); *People v. Pinon*, 2012 WL 3970457 (Cal. App. 2012) (inside a locked shed); *Knight v. State*, 72 So.3d 1056 (Miss. 2011) (under cushions of couch); *State v. Spencer*, 2011 WL 3359687 (Ohio App. 2011) (in bedroom closet).

In sum, the data provided by the ATF, the analysis of Amici, the marketing of such weapons for self defense, and the many cases addressing non-violent – though unlawful – possession of short-barreled shotguns all demonstrate the fallacy of the government's assertion that the ordinary case of possession of a short-barreled shotgun is possession during a violent crime. Instead, when possession of a short-barreled shotgun itself is properly examined, it is clear that it does not pose a serious risk of potential harm on par with the enumerated offenses. It is therefore not a violent felony.

II. Because Possession of a Short-Barreled Shotgun Is Not "Similar In Kind" To The Enumerated Offenses, It Is Not a Violent Felony.

In *Begay v. United States*, the Court held that "to give effect to every clause and word of this statute, we should read the examples as limiting the crimes that clause (ii) covers to crimes that are roughly similar, *in kind as well as in degree of risk posed*, to the examples themselves." *Begay*, 553 U.S. at 143 (citation omitted; emphasis added). In his opening Brief, Mr. Johnson argued that, not only is mere possession of a short-barreled shotgun not a violent felony because it is not as risky as the enumerated offenses, but it is also different in kind from the enumerated offenses in myriad ways.

The government responds that, because it claims that the Minnesota statute in question is not a strict liability offense, *Begay's* guidance plays no part in the instant question. The government also suggests that it is irrelevant that none of the enumerated offenses are crimes of simple possession. The government errs on both counts.

First, *Begay's* analysis, which asks whether an offense is "purposeful, violent and aggressive," remains uniquely relevant and necessary in cases such as this, where statistics are unavailable and the possessory offense at issue is qualitatively different than the enumerated offenses. Second, not only was Mr. Johnson convicted of the offense of mere possession of a short-barreled shotgun at a time when Minnesota's statute was likely a strict liability offense, but even if a greater degree of knowledge were required, numerous other states treat the offense as one of strict liability. Third, in other ways mere possession of a short-barreled shotgun is so distinct

from the enumerated offenses that, even aside from the low degree of risk posed, it cannot properly be treated as a violent felony.

A. *Begay's* "Purposeful, Violent and Aggressive" Test Is Essential In the Present Case.

There can be little doubt that applying the residual clause requires more than an arithmetic comparison of degree of risk posed by the offense in question with that posed by the enumerated offenses. Just six years ago, in *Begay*, the Court rejected a suggestion that the enumerated crimes did nothing more than provide parameters against which to measure degree of risk, and noted that they all "typically involve purposeful, violent and aggressive conduct." *Id.* at 144-45. The government's efforts to dismiss *Begay's* continuing vitality and its relevance to the present case must be rejected.

1. *Begay's* Analysis Applies Beyond Strict Liability.

The Court should reject the government's implicit suggestion that *Begay* has no application to the question before the Court unless the offense is a purely strict liability offense like drunken driving. Govt. Br. 49-52. Such a narrow focus understates the continuing vitality of *Begay's* analysis. Moreover, *Begay* provides essential guidance in cases, such as this, where useful statistics are unavailable to provide a meaningful assessment of risk.

First, the government overstates *Sykes*' treatment of *Begay* when it suggests that *Begay's* analysis is inapplicable unless the Minnesota statute is clearly one of strict liability. Govt. Br. 48-50. Indeed, regardless

of whether a defendant must know that the shotgun he possesses has a short barrel, no law banning such possession requires intent to commit a further crime. Such offenses are therefore plainly "*akin* to" strict liability, negligence, and recklessness crimes. The crime of mere possession of a short-barreled shotgun is markedly different from the high degree of intentionality and aggression required by the felonious vehicular flight from a law enforcement officer contemplated in *Sykes*, which necessarily entails "determination to elude capture" and a "direct challenge" to the authority of law enforcement. *Sykes*, 131 S. Ct. at 2273-74. In contrast to the actively confrontational and purposeful elements at issue in the flight offense in *Sykes*, in a case involving mere possession the qualitative assessment of *Begay* is essential to the analysis and not "redundant."

Finally, *Begay* must remain a vital part of residual clause analysis because there are many cases, such as the present one, where statistics are unavailable to assist the Court in weighing the risk presented by a predicate offense. As both parties concede, there is no clear data documenting injuries, deaths or other harm caused by the possession of short-barreled shotguns. The government argues (based on imagining other crimes that could follow from possession) that such risk is high, and Mr. Johnson counters (employing a categorical, elements-based analysis) that it is in fact quite low, but no statistics save the day. In such a case, particularly one involving no aggressive conduct, the qualitative assessment of *Begay* is invaluable. Not only is mere possession of a short-barreled shotgun not as risky as the enumerated offenses, but it is not by itself violent or aggressive like the enumerated offenses or those previously held to be violent felonies under the residual clause.

2. *Mens Rea*: Minnesota and Nationwide.

As Mr. Johnson set forth in his opening Brief, at most it is unclear whether violation of Minnesota Statute § 609.67 is today essentially a strict liability offense or an offense requiring a greater *mens rea*, and at the time of Mr. Johnson's offense it was almost certainly an offense of strict liability.[9] The government is correct that in *State v. Ndikum*, 815 N.W.2d 816 (Minn. 2012), the Supreme Court of Minnesota held that *mens rea* of knowledge should be read into a firearm statute dealing with possession of a handgun. *Ndikum* did not address whether the defendant had to be aware of certain characteristics of a firearm, but held only that the defendant must have known that he possessed it in order to violate the statute. The government argues that *Ndikum* means that a defendant charged with possession of a short-barreled shotgun must "knowingly possess" such a weapon. However, "different elements of the same offense can require different mental states." *Staples v. United States*, 511 U.S. 600, 608 (1994). Therefore, even today in light of *Ndikum*, it is not certain that a Minnesota defendant must know that the weapon he possesses has the characteristics that render it unlawful.

More importantly, the government does not effectively refute that, when Mr. Johnson was convicted in 2007, the

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9. In *Staples v. United States*, 511 U.S. 600, 606 (1994), the Court characterized the government's position that 26 U.S.C. § 5861(d) does "not require the defendant to know the facts that make his conduct illegal" as advocating "a form of strict criminal liability." The term "strict liability" is therefore appropriate to describe a statute that criminalizes the possession of a short-barreled shotgun without proof that a defendant is aware of the gun's unique characteristics.

statutory framework (in particular Minn. Stat. § 609.02, subd. 9), the model jury instructions, and the absence of jurisprudence to the contrary all suggest that the offense was likely one of strict liability. Pet. Br. 51. Although the government is correct that model jury instructions are not "binding," they are certainly "instructive," *see State v. Kelly*, 734 N.W. 2d 689, 695 (Minn. Ct. App. 2007), and the government disregards entirely the value of the 2007 instructions to discerning the *mens rea* of possession of a short-barreled shotgun at the time of Mr. Johnson's conviction.

Additionally, the government does not refute that in numerous other states with short-barreled shotgun statutes, it is either settled that a defendant need not be aware of the characteristics of the firearm that made it illegal in order to be prosecuted for such an offense, or the authority that exists is unclear as to the required state of mind. Pet. Br. 33-34 n. 18 & 19. Indeed, in Iowa, Illinois, Massachusetts, and North Carolina, either the state's Supreme Court or Court of Appeals has expressly held that no proof of knowledge regarding the weapon's dimensions is required. Therefore, *Begay* remains essential because, even if the *mens rea* of the Minnesota statute is in flux, other states treat unlawful possession of a short-barreled shotgun as strict liability offenses.

Moreover, if it is true that *Begay* is relevant only to statutes involving purely strict liability offenses, then the test for whether mere possession of a short-barreled shotgun is a violent felony would be significantly different depending on the *mens rea* of the state statute, even though the underlying crimes are identical. For instance, violation of North Carolina's statute, which

is clearly a strict liability offense as to knowledge of the gun's length, would not be a violent felony because such a crime is not "purposeful, violent and aggressive," while a court considering California's statute would not even conduct such an inquiry because that statute requires that the defendant knew of the gun's length. Such a narrow construction of the relevance of *Begay* is clearly unworkable. Instead, *Begay's* analysis applies to the question before the Court because mere possession of a short-barreled shotgun is criminalized despite any absence of further criminal intent.

B. The Lack of Possession Offenses Among the Enumerated Offenses Supports a Finding That Possession of a Short-Barreled Shotgun Is Not a Violent Felony.

Petitioner has argued that one of several critical differences between the enumerated offenses and the offense at issue in the present case is that possession of a short-barreled shotgun is an offense of mere possession. Pet. Br. 19-25. The government mischaracterizes this argument, suggesting that Petitioner is seeking "categorical exclusion" of all possession offenses due to their absence within the listed enumerated offenses. Govt. Br. 45-46. The government observes that the effort to categorically exclude attempt offenses failed in *James*, 550 U.S. at 198-99, and suggests that, for the same reason, possession offenses cannot be excluded from the residual clause. However, the government's reliance on the failed argument in *James* is misplaced.

The Court in *James* cautioned that "the broad residual provision" was not meant to be an "exhaustive

list." *James*, 550 U.S. at 200. The crime of attempted burglary fell squarely within the ambit of the residual clause because attempted burglary, reviewing the conduct encompassed by the elements of the offense, was virtually indistinguishable from and presented at least as much risk of confrontation or injury as completed burglary. The common characteristic of the enumerated offenses was not "completion," but that they "create significant risks of bodily injury or confrontation that might result in bodily injury." *Id.* Possession of short-barreled shotgun offenses, in contrast, are excluded because they are not at all similar in kind and present significantly less risk of bodily injury or confrontation than the risk associated with the enumerated offenses, not simply because they are missing from the list of enumerated offenses. Moreover, while in *James* the Court noted that "[n]othing in the statutory language supports the view that Congress intended to limit this category solely to completed offenses," the specific inclusion of "use of explosives" among the enumerated offenses provides a strong textual rationale for excluding "possession" offenses such as found here.

Finally, the government attempts to explain why its position that merely possessing a short-barreled shotgun is a violent felony does not functionally erase the term *use* from *use of explosives* in the enumerated crimes. Govt. Br. 47-48. However, its complicated theory lacks evidentiary support and ignores the statute's plain language. The government assumes without evidence that when Congress passed the ACCA, (1) it intended that the residual clause silently included the possession of *destructive devices* under the NFA, 26 U.S.C. § 5845(f); and, (2) it added *use of explosives* only so that the use of any explosives not covered by the *destructive device*

definition would be a violent felony. But no evidence supports either assumption. Concluding that Congress intended to accomplish such a complicated objective without leaving any clues in either the statute or the legislative history beggars belief. Instead a much simpler understanding of the phrase *use of explosives* is supported by the text and legislative history: that Congress meant to include explosives offenses as violent felonies under the ACCA only if the offenses involved using explosives. This explanation hews to the plain text and avoids interpreting *use of explosives* based on the definition of a totally different term (*destructive device*) in a different statute in a different title without any evidence suggesting Congress intended such a complex and unusual interpretation. *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 (2009)("When conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.") (internal citations omitted).

In sum, the Court should reject the government's assertion that the absence of possession crimes from the enumerated offenses and the inclusion of "use" before explosives have no bearing on the question before the Court. Indeed, the statute's plain language underscores the conclusion that possessing a short-barreled shotgun is not a violent felony.

CONCLUSION

For the reasons set forth herein and in Petitioner Samuel Johnson's opening Brief, the Court should hold that possession of a short-barreled shotgun is not a violent felony, and should remand so that Mr. Johnson can be resentenced.

Dated: September 17, 2014

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SUPPLEMENTAL BRIEF

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SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE RESIDUAL CLAUSE IN THE ARMED CAREER CRIMINAL ACT OF 1984, 18 U.S.C. § 924(e)(2)(B)(ii), IS UNCONSTITUTIONALLY VAGUE

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Cited Authorities

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United States v. Vanhook,
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United States v. Vann,
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Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f)(1), 123 Stat. 1617, 1618 (codified at 18 U.S.C. § 1956).....48

OTHER SOURCES

Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235 (1994) 55

Richard Fallon, *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915 (2011).....54

David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 Conn. L. Rev. 209 (2010) 22

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Retired Justice Sandra Day O'Connor, *Forward: The Rule of Law and Civic Education*, 62 SMU L. Rev. 693 55

United States Sentencing Commission, Report of Federal Escape Offenses in Fiscal Years 2006 and 2007 (Nov. 2008) 19

Merriam-Webster Dictionary (http://www.merriam-webster.com/dictionary)(last visited Feb. 18, 2015) ...7

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person . . . shall be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. §§ 924(e)(1) and (e)(2)(B) (Armed Career Criminal Act):

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)
>
> (e)(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that —
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . . .

STATEMENT[1]

1. The Court has asked the parties to address whether the "residual clause" of the Armed Career Criminal Act (ACCA) is unconstitutionally vague. Although Samuel Johnson's request for certiorari did not raise this question, it was raised below.

2. In his Sentencing Position, Mr. Johnson objected to his treatment under the ACCA and argued that the provision was unconstitutionally vague. (Defendant's Sentencing Position, dckt. no. 25, p. 14) The district court rejected this challenge, noting that it was "bound by the precedent of the Supreme Court" on the vagueness issue. (Sentencing Hearing, September 5, 2012, p. 18, dckt. no. 29).

3. Mr. Johnson also raised the vagueness challenge on appeal to the Eighth Circuit Court of Appeals. (Case no. 12-3123) On July 31, 2013, in an unpublished per curiam opinion, the Eighth Circuit rejected this claim, noting that this Court has "upheld the constitutional validity of § 924(e) against challenges that it was unconstitutionally vague." *United States v. Johnson*, 2013 WL 3924353, *7 (8th Cir. 2013).

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1. Most of the relevant procedural history and factual background have been set forth in the Statements provided in the opening Briefs, and will not be restated here.

SUMMARY OF ARGUMENT

The residual clause of the ACCA's violent felony definition is unconstitutionally vague. Although it is only fourteen words long, the impact of the poorly drafted clause cannot be overstated. Contained within a criminal statute, the residual clause converts the offense of being a felon in possession of a firearm from a crime for which a defendant can be incarcerated for no more than ten years into an offense mandating no less than fifteen years behind bars, and permitting imprisonment for life. Such an onerous penalty must not rest on the shaky foundation of an unclear statute.

The vagueness of the residual clause is apparent from the language of the provision itself, which fails to provide limits to govern its nebulous coverage or definitions to narrow its scope. In addition, although this Court has now endeavored five times to interpret the clause and identify a framework by which it can be applied consistently to the wide variety of state court crimes that might or might not fall within it, the Court has not yet succeeded. Instead, each effort has led to a different analytical framework that resolves the particular case before the Court, but fails to articulate an interpretive principle that can resolve future cases considering other types of offenses. As each new residual clause decision adds to the challenge, members of the Court have repeatedly called for Congressional intervention, but to no avail.

The vagueness of the language and this Court's inability to craft a clear framework for its application have left lower courts without guidance, struggling to apply the residual clause consistently to the countless state court

offenses that might be included within its reaches. Circuit courts are in turmoil and their decisions reflect significant disagreements regarding the violent felony status of many offenses, disagreements which remain even when this Court has already specifically addressed a similar offense. In addition, lower courts are widely divided regarding the proper analytical framework to apply, with various courts emphasizing different holdings from this Court's jurisprudence in sometimes contradictory ways.

The residual clause's vagueness violates the Due Process Clause of the Constitution. It fails to provide notice to citizens and lawyers regarding the scope of its provisions. It provides so little guidance to courts and the government that it is applied arbitrarily and inconsistently from one case to the next. And the clause requires the Court to attempt, in vain, to bring clarity where none exists, struggling to shoulder a burden that the Constitution plainly leaves to Congress. The Court should hold that the residual clause is void due to its unconstitutional vagueness, both as applied to Samuel Johnson's offense of mere possession of a short-barreled shotgun, and across the board. It is time for the Court to recognize the residual clause for "the drafting failure it is" and declare it void for vagueness.

ARGUMENT

I. THE ACCA'S RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE.

The residual clause of the ACCA is unconstitutionally vague. The Due Process Clause requires a statute, particularly a criminal statute that sends people to

prison for a very long time, to be drafted with sufficient clarity that it puts citizens, prosecutors, and courts alike on clear notice of what it requires, what it forbids, and the consequences of violating it. This fundamental requirement protects citizens from arbitrary enforcement and allows them to conform their conduct to the law. As importantly, it preserves the essential roles of both Congress and the Court and leaves to the former the job of defining crimes and punishments.

The residual clause is so vaguely worded that it achieves none of these goals. It not only fails to advise a prospective criminal whether he will be burdened with the extreme sentences required by the ACCA, but even learned counsel steeped in the clause's intricacies struggle for the answer. The lower courts' applications of the residual clause are wildly divergent. Defendants from different circuits with identical criminal histories face widely disparate sentences because, despite honest efforts, lower courts cannot achieve anything resembling uniform application of the clause's scope. Most frustratingly, although this Court is now trying for a fifth time since 2007 to articulate an intelligible analytical framework that corrects the residual clause's mistakes and fills in its omitted clarity, the Court's efforts have proved unsuccessful. Despite repeated calls for legislative correction, Congress has not seriously tried even once to fix the residual clause since its adoption.

Declaring a statute unconstitutionally vague is undoubtedly strong medicine, but this Court's exhaustive efforts to salvage the statute through the normal avenues of statutory interpretation and discernment have proven insufficient. The experience of the last decade of litigation

has shown that the residual clause is irredeemably, unworkably opaque. This Court should strike it down as unconstitutionally vague.

A. The Residual Clause of the ACCA Is Fundamentally Vague.

The residual clause of the ACCA, found within 18 U.S.C. § 924(e)(2)(B)(ii), includes in the definition of violent felony any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." That inscrutable clause, a thorn in the side of this Court and others for many years, is undeniably vague.

1. Textual Vagueness: The Statutory Language Is Simply Unclear.

An examination of the text of the residual clause demonstrates that it is plagued by a lack of clarity. It contains several points of ambiguity that, together, fail to provide either notice or guidance: its conflicting terms permit "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meaning." *United States v. Williams*, 553 U.S. 285, 306 (2008). Worse, unlike many federal criminal statutes which include definitions for unclear words and phrases, the ACCA does not define any of the residual clause's vague or ambiguous terms. Simply put, the language of the residual clause itself dealt the Court a very bad hand indeed.

Originally, the ACCA treated only burglary and robbery as violent felonies and the statute defined both terms. *See Taylor v. United* States, 495 U.S. 575, 581 (1990). However, in 1986, Congress decided to change the

law so that more offenses would count as predicates under the ACCA and grappled with how to do so. It considered simply adding crimes to the list of enumerated offenses, adding all offenses that have force as an element, or adding a "catch-all" rule that considered the risk that physical force would be used. *Taylor*, 495 U.S. at 587. In the end, Congress adopted versions of all three approaches. Congress altered the "catch-all" provision so that it included offenses which presented risk of injury instead of risk of the use of force, and attached that provision to the enumerated offenses with the word "otherwise." The clause now reads: "is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*" § 924(e)(2)(B)(ii). Although no part of this language is clear, two sections contribute most to its overall vagueness: the use of four disparate examples followed by "otherwise," and the phrase "serious potential risk."

The strange construction of the residual clause creates ambiguity, and the use of the word "otherwise" adds confusion. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, (1991) (noting that confusing grammatical structure contributes to the rule's vagueness). The clause follows a list of four substantially dissimilar offenses, purporting to add all unspecified crimes that "otherwise" involve conduct that presents the stated degree of risk. Although the most common dictionary definition of otherwise is perhaps "in a *different* way or manner,"[2] the Court has read the word in the residual clause as meaning that

2. *See Merriam-Webster Dictionary* (http://www.merriam-webster.com/dictionary)(last visited Feb. 18, 2015)

the risk presented must be the *same* as the enumerated offenses that precede it. *Begay v. United States*, 553 U.S. 137, 151-52 (2008) (Scalia, J., concurring). The confusing meaning of "otherwise" is magnified by the dissimilarities between the enumerated offenses.

> The phrase "shades of red," standing alone, does not generate confusion or unpredictability; but the phrase "fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red" assuredly does so.

Id.

Not only is the residual clause's design a significant source of vagueness, but it is made worse by its inclusion of three words that, read together, have almost no clear meaning: "serious potential risk." The three words together represent a confounding mix of contradiction and redundancy. Such confused phrasing, without any other statutory definition, exemplifies precisely what the vagueness doctrine forbids: a term without a concrete meaning that permits judges, juries, and others to exercise their subjective whim. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 392 (1926) (noting that a statute's critical terms must be sufficiently clear because an "important element cannot be left to conjecture, or be supplied by either the court or the jury" (citation omitted)).

First, the term "serious," as the Court cheekily noted in *United States v. Stevens*, must be "taken seriously." 559 U.S. 460, 462 (2010) (examining the term "serious" in a statute criminalizing depictions of animal cruelty). Rejecting the government's suggestion that the word

refers to "anything that is not scant," the Court explained that "[s]erious ordinarily means a good bit more." *Id.* at 478. The Court wrote approvingly of the government's concession below that a commonly accepted meaning of the word "serious" was "significant and of great import." *Id.*

The use of "serious" in the residual clause must similarly be intended to narrow the provision's reach to only predicate offenses presenting a risk that is "significant and of grave import," rather than scant, remote, or merely average. But this apparent clarity evaporates in context. The next two words, read together, seem to directly contradict the word "serious," leaving the three words together arguably meaningless, and certainly unclear.

To start with, "potential" is different from actual and means something less concrete. In *Colautti v. Franklin*, 439 U.S. 379, 386-87, 391-93 (1979), the Court considered the term in a statute governing abortions, and found that a fetus' "potential" ability to survive was broader than an actual ability to survive. When read with the term risk, potential becomes even less concrete. As the Court surmised in *James*, "potential risk" is an "inherently probabilistic" concept. 555 U.S. at 207. But how "probabilistic" can it be when it must also be "serious" and what of the obvious redundancy of "potential risk"?

Certainly, other statutes use language similar to "serious potential risk." In both *James* and *Sykes*, explored in detail below, the Court identified other statutes that used language comparable to the residual clause's phrase, suggesting that because similar words appear in other laws, the clause is not unconstitutionally vague. *See James v. United* States, 550 U.S. 192, 210 n.6

(2007), and *Sykes v. United States*, 131 S. Ct. 2267, 2277 (2011). However, not one of these statutes contains the interpretive quagmire inherent in the fourteen words of the residual clause. None of the statutes listed employ the word "potential." Nor do they complicate matters by providing a list of four widely disparate examples followed by "otherwise" before the phrase in question.

More importantly, each of the examples referred to by the Court uses a similar term more clearly and in a context less likely to raise constitutional concerns than the residual clause. For instance, 18 U.S.C. § 1031(b)(2), which increases the fine (but not the term of incarceration) in a fraud case, requires "conscious or reckless risk of serious personal injury," attaching both a narrowing *mens rea* and a degree of gravity to the injury required. Similarly, § 2258B(b)(2)(B) deals with civil penalties and nonetheless requires intentional or reckless conduct. Likewise, § 2118(e)(3) and § 2246(4) include the term "risk of death" as one aspect of a detailed definition of "significant bodily injury." In both statutes the provisions, when read in context, are quite specific and precise.[3]

The examples from the *James* footnote are even more readily distinguishable. Title 18 U.S.C. § 2332b(a)(1)(B), for instance, uses the term "substantial risk of serious bodily injury" as an element, but requires the defendant to

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3. Although 18 U.S.C. § 3286(b) uses the term "foreseeable risk of death or serious bodily injury," it does so only to extend the statute of limitations for certain terrorism offenses that either cause or create the risk. Moreover, "foreseeable" serves as a limitation on the risk, requiring the risk to be an intended or predictable consequence of the offense. There is no such limitation on "serious potential risk" in the residual clause.

create that risk by first damaging or destroying property, a much clearer requirement tying a narrowly tailored action to the resulting risk. In contrast, the residual clause does not tie the risk to *any* action of the defendant, let alone a specific action. Instead, the offense must only involve "conduct that presents" the required risk, another portion of the residual clause that detracts from, rather than adds to, the clarity of the provision.[4]

Another crucial distinction is that the Court has not once considered whether any of the listed statutory provisions are unconstitutionally vague, let alone grappled with their meaning over and over again, as it has done with the residual clause. Finally, the simple appearance of similar (though certainly less vague) language in another statute does not prove that the residual clause's language is sufficiently clear.[5] "Of course, even if the cited statutes

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4. In addition, the vagueness of the clause is exacerbated by the fact that the risk that is otherwise presented need not be an element of the offense, in contrast to the requirement in the force clause; instead the offense must only otherwise involve "conduct that presents" the risk.

5. The contrast between the residual clause and statutes that are sufficiently clear is demonstrated by two decisions considering statutes that govern abortions. In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court considered a Nebraska statute which criminalized delivery of a "substantial portion" of a fetus during an abortion and found that the undefined term failed to provide useful limits that would prevent the law from improperly impinging on a woman's rights. In contrast, in *Gonzales v. Carhart*, 550 U.S. 124, 148-49 (2007), the Court rejected a vagueness challenge to a similar bill passed by Congress in response to *Stenberg*, noting that its more specific language provided "relatively clear guidelines as to prohibited conduct," and "objective criteria" to discern when a

were comparable, repetition of constitutional error does not produce constitutional truth." *Sykes*, 131 S. Ct. at 2288 (Scalia, J., dissenting).

In sum, none of the statutes the Court mentioned in its brief consideration of vagueness in *James* and *Sykes* presented the linguistic imbroglio posed by the "vague and fluid" residual clause. *See United States v. Cardiff*, 344 U.S. 174, 176 (1952) (warning against such terms in criminal statutes).

2. Interpretive Vagueness: The Court's Efforts Have Been Unsuccessful.

This Court's jurisprudence demonstrates rather than vitiates the unconstitutional vagueness of the residual clause. The Court is now reviewing the scope and application of these fourteen words for the fifth time since just 2007, an unprecedented frequency of attention for the highest court to give to any statute, let alone a single clause within a subdivision of a statute. At each turn, the Court has tried to articulate a test to guide application of the clause, not just to the case before it, but to other predicate offenses as well. Unfortunately, the shortcomings of each interpretive effort are quickly revealed by the next predicate offense that cannot be judged by applying the previous tests. That the Court has felt it necessary to accept review so often in order to instruct lower courts demonstrates the statute's vagueness. The Court's inability to provide a useful

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doctor has performed an unlawful procedure. *Id.* at 149 (citations omitted). The difference between the vague "substantial portion" and the specific rules later adopted by Congress made the latter law constitutional when the former was not.

interpretive rule to guide lower courts and notify potential defendants despite all of these efforts is even more telling.

James v. United States (2007): As Risky As the Closest Analog

In 2007, the Court addressed the residual clause specifically for the first time in *James v. United States*, 550 U.S. 192, and considered whether attempted burglary under Florida law qualified as a violent felony.[6] Although perhaps *James* presented the most straightforward question of all of the felonies contemplated by this Court's residual clause jurisprudence, there was nonetheless disagreement among the circuits before the Court's decision.[7] The Court held that a predicate offense, examined categorically based on its elements, qualified under the residual clause if it posed a risk "comparable to that posed by its closest analog among the enumerated offenses." *Id.* at 203. "Potential risk" was described as an "inherently probabilistic" concept, but the Court made no mention of the word "serious." *Id.* at 207.

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6. *James* and the other residual clause cases were decided against the important backdrop of the "categorical" and "modified categorical" approaches of *Taylor* 495 U.S. at 600-03 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005). Although neither were residual clause cases, but instead considered other portions of the ACCA's violent felony definition, since *James*, the Court has applied the same categorical, elements-based approach to the residual clause.

7. *See* Petition for Certiorari, *James v. United States*, No. 05-9264 (noting a split among the circuits regarding whether various statutes criminalizing attempted burglary count as violent felonies).

The *James* Court also introduced the "ordinary case" concept, and said that the proper inquiry is "whether the conduct encompassed by the elements of the offense, in the ordinary case" presents the requisite risk. The Court concluded that an ordinary case of attempted burglary was at least as risky as regular burglary. *Id.* at 208. No guidance was given regarding how a court should select the hypothetical "ordinary case" when conducting the analysis.

Right away, the difficulties inherent in the Court's test were clear. Four members of the Court dissented for two different reasons. Justice Scalia, joined by Justices Stevens and Ginsburg, described the challenge that lower courts would have applying the *James* construct:

> The problem with the Court's approach to determining which crimes fit within the residual provision is that it is almost entirely ad hoc. *This* crime, the Court says, *does* "involv[e] conduct that presents a serious potential risk of physical injury to another." That gets this case off our docket, sure enough. But it utterly fails to do what this Court is supposed to do: provide guidance concrete enough to ensure that the ACCA residual provision will be applied with an acceptable degree of consistency by the hundreds of district judges who impose sentences every day.

Id. at 215 (Scalia, J., dissenting). The "closest analog" rule might work in a case where the closest analog is readily apparent, but is less useful for other crimes, like drunken driving. *Id.* at 215-16. The dissent suggested that a court should instead require the degree of risk to be no

less than "the risk posed by the least dangerous of those enumerated crimes."[8]

In addition, the dissent strongly criticized the vagueness of the provision, even though the parties had not briefed the issue. It noted that "[i]mprecision and indeterminacy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of ACCA's residual provision, yet its boundaries are ill defined." *Id.* at 216. Even then, at the beginning of the Court's long grappling with the residual clause, the dissenting members suggested that "Congress has simply abdicated its responsibility when it passes a criminal statute insusceptible of an interpretation that enables principled, predictable application."[9] *Id.* at 230. The majority, operating without the benefit of the spate of thorny cases that would soon follow, answered the concern about vagueness by noting that the residual clause is not "so indefinite as to prevent an ordinary person from understanding what conduct it prohibits," and citing statutes with similar language, as explored above. *Id.* at 210 n.6.

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8. Interestingly, although the dissent found that the least dangerous of the enumerated offenses was burglary and therefore compared the risk of attempted burglary to burglary just as the majority had, the dissent concluded that the balance tilted the other way and the risk posed by the attempt was plainly less. *Id.* at 226-27. Even conducting the same comparison, the two "sides" reached different conclusions about risk.

9. Justice Thomas dissented for the same reasons he dissented in *Shepard*, 544 U.S. at 27, namely his belief that *Apprendi v. New Jersey*, 530 U.S. 466, 487-88 (2000), and the Sixth Amendment preclude judges from making the determination of whether a prior offense is a violent felony under the ACCA. *James*, 550 U.S. at 231-232.

The split decision from the Court in *James* and the explicit three-Justice suggestion that the clause was vague were surely a call for congressional action.

***Begay v. United States* (2008): Purposeful, Violent, and Aggressive**

Five months after *James*, the Court granted review in *Begay v. United States*, again taking on the interpretive task left to it by the residual clause's unclear wording. The *James* "as risky as the closest analog" test had already proved insufficient to answer the question of whether felony driving under the influence of alcohol (DUI) satisfied the residual clause. Again, the Court was divided, with five Justices in the majority, Justice Scalia concurring on much different grounds, and three Justices dissenting. *Begay*, 553 at 139, 148, 155.

At the outset the majority assumed (and implicitly agreed) that DUI "involves conduct that presents a 'serious potential risk of physical injury to another,'" *id.* at 141, a conclusion which would have ended the inquiry under *James*' risk comparison. Indeed, the Court did not attempt to compare DUI to whatever enumerated offense might be its closest analog, simply accepting that it is "an extremely dangerous crime." However, the majority decided that DUI "is simply too unlike the provision's listed examples for us to believe that Congress intended the provision to cover it," and then looked for a way to formulate that observation into a useful interpretive framework for the residual clause. *Id.* at 141-42.

The result was the Court's conclusion that in order to qualify as a violent felony, an offense had to be "roughly

similar, in kind as well as in degree of risk posed," to the enumerated offenses. *Id.* at 143. The Court noted that the listed "examples" all typically involve "purposeful, violent and aggressive" conduct, and suggested those terms as guideposts against which to compare a particular predicate offense. *Id.* at 144-45. The Court also suggested that crimes that are, "or are most nearly comparable to, crimes that impose strict liability" should not count under the residual clause. *Id.* at 145.

The concurrence and dissent reflected, for a second time, the flaws inherent in the residual clause and the Court's struggle to articulate a workable test. Justice Scalia described the Court's latest effort as another "made-for-the-case improvisation" that was inadequate to encompass all future cases. *Id.* at 150 (Scalia, J., concurring). Agreeing with the dissent that the "purposeful, violent and aggressive" formulation finds no home in the clause's language and that the sole question should be risk, he disagreed with both the majority and the dissent that DUI posed the requisite degree of risk. The concurrence pointed to significant flaws in the statistics relied upon by the majority, including the fact that the total incidence of death from DUI does not demonstrate the likelihood that a given incidence of the crime will cause harm. *Id.* at 154. Justice Scalia urged application of the rule of lenity: "I will not condemn a man to a minimum of 15 years in prison on the basis of such speculation." *Id.*

The three-Justice dissent agreed both with the majority's conclusion about the risk caused by DUI and with the concurrence's conclusion about the lack of statutory support for the "similar in kind" framework, and therefore argued that drunken driving fell within the

residual clause. *Id.* at 155-63. However, Justice Alito, who authored the dissent, noted that the clause "calls out for legislative clarification," and expressed sympathy for the majority's "attempt to craft a narrowing construction." *Id.* at 155.

For the second time, Congress was asked for help from members of the Court.

***Chambers v. United States* (2009): Quantitative and Qualitative Assessment**

Apparently recognizing already that neither of its previous efforts would decide whether failing to report for weekends in jail under Illinois's escape statute was covered by the residual clause, the Court granted certiorari in *Chambers v. United States*, 555 U.S. 122 (2009), just five days after it decided *Begay*. The question presented was, once again, whether a particular state offense counted as a violent felony under the residual clause, but instead of sending the case back for reconsideration in light of *Begay*, full review was necessary. Once again, the case came to the Court amid a clear Circuit split.[10]

The *Chambers* decision was the least controversial among this Court's struggles with the residual clause, as all nine Justices concurred in the judgment, and only two Justices joined in a single concurrence. The Court held that failure to report was "[c]onceptually speaking" a "far cry" from the purposeful, violent and aggressive conduct

10. *See id.* at 125 (noting a 2-1 split on the issues of walkaway escape from custody); Petition for Certiorari, *Chambers*, No. 06-11206 (noting a greater 10-2 split on the broader issue of escape).

the statute required. *Id.* at 128. The Court also relied on statistics documenting that failure to report or to return from temporary release almost never involved violence. *Id.* at 129 (citing United States Sentencing Commission, Report of Federal Escape Offenses in Fiscal Years 2006 and 2007 (Nov. 2008)).

The unanimity of the result, however, did not indicate that interpretative consensus had been achieved or that the Justices' mounting frustrations with the residual clause had been resolved. Justice Alito, joined by Justice Thomas, concurred: "I write separately, however, to emphasize that only Congress can rescue the federal courts from the mire into which ACCA's draftsmanship and *Taylor*'s 'categorical approach have pushed us.'" *Id.* at 132.

> After almost two decades with *Taylor*'s "categorical approach," only one thing is clear: ACCA's residual clause is nearly impossible to apply consistently. Indeed, the "categorical approach" to predicate offenses has created numerous splits among the lower federal courts, the resolution of which could occupy this Court for years. What is worse is that each new application of the residual clause seems to lead us further and further away from the statutory text.

Id. at 133.

This was the third time members of the Court asked Congress to help sort out the quagmire caused by the residual clause.

Sykes v. United States (2011): Statistics and Common Sense

This time the Court waited a bit before taking another bite at the residual clause, agreeing in 2010 to decide whether fleeing the police in a motor vehicle in violation of Indiana law was a violent felony. The question of felony fleeing had divided the lower courts,[11] and even led to rapid vacillations within individual circuits. *See* section A(3), *infra*. Predictably, the *Sykes* decision was the most divisive of all, yielding four separate opinions and a six-three split as to the proper outcome. *Sykes v. United States*, 131 S. Ct. 2267 (2011).

The majority relied both on its "commonsense conclusion" that vehicular flight is a violent felony and on statistics documenting crashes during flights from the police nationwide to support its holding that the offense qualifies under the residual clause. *Id.* at 2274. In reaching this conclusion, the majority suggested that the *Begay* formulation requiring consideration of whether a crime was purposeful, violent and aggressive was "redundant" of the risk analysis it conducted, *id.* at 2275, and further advised that the formulation was mostly useful in assessing offenses "akin to strict liability, negligence, and recklessness crimes." *Id.* at 2276. No mention was made of the fact that the *Begay* test had been adopted only four years previously, following a realization that assessing risk alone simply did not answer the necessary question in certain cases. Although the *Sykes* majority expressly considered only the risk that fleeing presented and not its qualitative nature, it spent several paragraphs

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11. *Sykes*, 131 S. Ct. at 2272 (2011) (describing a 5-3 division among Courts of Appeals regarding fleeing in violation of various state statutes).

characterizing the crime as a "provocative and dangerous act," with "confrontations" at the beginning and end of the crime.

The other opinions from *Sykes* demonstrated both the difficulty of answering the very narrow question before the Court and the impossibility of crafting a clear test applicable to a broad swath of predicate offenses. Justice Thomas concurred with the judgment, celebrating the majority's decision not to rely on the *Begay* test and bemoaning the suggestion that the test had continuing relevance in certain cases. *Id.* at 2277. Justice Thomas also relied on "common sense and real world experience," which, reinforced by statistics and media reports about injuries during police chases, confirmed the crime's dangerousness. *Id.* at 2280. He emphasized "ordinary case" analysis to reject the observation that the statute could be and indeed had been violated in non-risky ways. *Id.* at 2281.

Justice Scalia dissented, offering his most comprehensive analysis to date of the residual clause's vagueness and resulting unconstitutionality. *Id.* at 2284. He urged that the *Sykes* formulation created "a fourth ad hoc judgment that will sow further confusion," and noted that the Court applied neither the closest analog test of *James*, nor the "purposeful, violent and aggressive" test from *Begay*. *Id.* at 2285. Most importantly, Justice Scalia criticized the majority's reliance on statistics to bolster its conclusion. He noted that the Court did not consider whether the dataset on which it relied was "a representative sample of all vehicular flights"; nor how many of the injuries at issue are attributable to a reckless driver rather than a person engaged in a flight from police; nor whether the statistics quantifying the risks presented

by the enumerated offenses were accurate themselves. *Id.* at 2286.

> In sum, our statistical analysis in ACCA cases is untested judicial fact finding masquerading as statutory interpretation. . . . [T]he more fundamental problem with the Court's use of statistics is that, far from eliminating the vagueness of the residual clause, it increases vagueness. Vagueness, of course, must be measured *ex ante* — *before* the Court gives definitive meaning to a statutory provision, not *after*. . . . And is it seriously to be expected that the average citizen would be familiar with the sundry statistical studies showing (if they are to be believed) that this-or-that crime is more likely to lead to physical injury than what sundry statistical studies (if they are to be believed) show to be the case for burglary, arson, extortion, or use of explosives? To ask the question is to answer it.

Id. at 2286-87.[12] Although Justice Scalia acknowledged that the Court had, in the past, upheld other vague

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12. Justice Scalia is not alone in bemoaning the unreliability of statistical analysis by appellate courts grappling with the residual clause. As one commentator has observed, "[w]ithout any standards, the statistical approach is a dressed-up version of the imaginary ordinary crime approach and the smell test. Ultimately, they are all subjective inquiries that guesstimate the violence of crimes whose elements do not require violent conduct. . . . Such a capricious method of statutory interpretation cannot adequately place offenders on notice of which actions trigger the ACCA and its fifteen-year minimum . . . ." David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 Conn. L. Rev. 209, 254 (2010).

statutes against constitutional challenges, "[w]hat sets ACCA apart from those statutes — and what confirms its incurable vagueness — is our repeated inability to craft a principled test out of the statutory text. We have demonstrated by our opinions that the clause is too vague to yield 'an intelligible principle,' each attempt to ignore that reality producing a new regime that is less predictable and more arbitrary than the last." *Id.* at 2287-88 (internal citation omitted).

Justice Kagan, joined by Justice Ginsburg, separately dissented. Emphasizing the importance of examining the specific statutory subsection of the state law at issue rather than "some abstract notion of vehicular flight," the dissent concluded that the provision did not proscribe an offense that presented the required degree of risk, although other subsections of the statute did. *Id.* at 2289-90. Noting that the "purposeful, violent and aggressive," test was applied not only in *Begay*, but was also cited with approval in *Chambers*, which considered a plainly intentional crime, the dissent predicted that the formulation would make a resurgence in the next case that considers a crime that "involves risk of injury but not violence or aggression." *Id.* at 2289 n.1.

For the fourth time in five years, members of the Court, both explicitly and implicitly, asked Congress to fix the statutory language that had given rise to such disparate conclusions.

***Johnson v. United States* (2015): A Crime of Mere Possession**

On the heels of these four decisions, the Court granted review in the instant case just seven years after it decided *James*, accepting the request to settle yet another deep circuit split presented by yet another predicate offense that was dissimilar to all of the ones that had been considered before. Any test or rule that the Court may craft to deal with this case — a case of mere possession, involving conduct that is widely legal, and lacking any useful statistical evidence — remains to be seen. However, the government, seemingly recognizing that none of the Court's previous decisions leads to obvious inclusion of the offense at issue within the residual clause's scope, has proposed yet another interpretative device for the Court: the predicate offense should be judged, not based on its own elements, but based on other possible offenses that the predicate offense may one day enable. This theory certainly explains the government's repeated suggestion that the ordinary case of mere possession of a short-barreled shotgun is possession by a criminal in connection with a violent crime. *See, e.g.*, Govt. Br. 18. Unfortunately, this test is untrue, unworkable, and provides even fewer guidelines and limitations than any of the other tests which the Court has tried.

In sum, the Court's sincere and sustained efforts to bring clarity to the residual clause have been unsuccessful, perhaps leaving things even more muddled than when they began. In each case, the Court seems to have been guided as much by the majority's intuitive sense about the danger presented by an offense in its generic form as by the language of the clause itself. For instance, the

"closest analog" analysis of *James* may guide whether to include an offense that is a variation of an enumerated crime. The "purposeful, violent and aggressive" test of *Begay* helps explain why the risky conduct of DUI cannot be what Congress intended when it defined violent felony. And the *Sykes* majority's intuitive sense that fleeing the police is very dangerous let it focus less on the statutory subdivisions at issue in that case and more on the offense of fleeing generally, and to elevate statistical "evidence" over an analytical framework it had relied upon just four years before. But none of these tests squarely resolve either the question now before the Court, or the many other questions raised by the clause's vague language.

If the Court's four previous tests are applied to the residual clause, its original fourteen words might now read something like this:

> *[Violent felony includes an offense that] is similar in kind as well as in degree of risk to its closest analog among burglary, arson, extortion, or the use of explosives (if that can be identified) when the ordinary case representing the offense in question is viewed by examining its elements categorically, based on a consideration of such statistics as are brought to the Court's attention and is also "purposeful, violent and aggressive" (though this last part may only matter if the specific offense has a mens rea akin to negligence, recklessness or strict liability.)*

Although each addition to or clarification of the test was offered in an attempt to decide the case then before

the Court, to guide lower courts, and to notify citizens, the combined effect of the Court's efforts has been the opposite.

3. Inconsistency in Application: The Lower Courts are Hopelessly Adrift.

The unconstitutional vagueness of the residual clause is perhaps most clearly demonstrated by the never-ending turmoil within the district courts and courts of appeals as they struggle to apply the clause's language, and to adapt to each of this Court's decisions altering the applicable legal standard. Not only have the courts themselves expressed increasing frustration with the challenge of implementing a clause that is both difficult to apply and onerous in impact, but their decisions are all over the map, with splits among the circuits regarding many predicate offenses.

First, the courts have expressed frustration with the residual clause, though they recognize that now only this Court can declare it unconstitutionally vague. In *United States v. Vann*, 660 F.3d 771 (4th Cir. 2011), for instance, the Fourth Circuit convened *en banc* to determine whether violating a particular subsection of North Carolina's "indecent liberties" statute constitutes a violent felony under the residual clause. Although the votes broke down ten to two in favor of holding that the offense did not qualify, there were seven separate opinions expressing widely different reasoning. The task was made more complicated by real questions about whether the categorical approach or modified categorical approach should apply, and the outcome that resulted from each in applying *Begay*, *Chambers*, and *Sykes*. Judge Agee, who

authored one of the many opinions, eloquently expressed the difficulty of applying the required analysis:

> [N]o matter how diligently and painstakingly my colleagues and I labor over the mystery of the ACCA residual clause, a black hole of confusion and uncertainty stymies our best efforts. . . . The dockets of our court and all federal courts are now clogged with these cases. Unless Congress acts to provide clarity to its intent for this statute, the problem will only continue.

Vann, 660 F.3d at 787 (Agee, J., concurring) (internal quotation marks omitted); *see also United States v. Pate*, 754 F.3d 550, 557 (8th Cir. 2014) (describing Justice Scalia's views on the residual clause as "well known and eloquently expressed," but observing that the panel was precluded by precedent from adopting the vagueness argument, regardless of what they personally thought.)

Similarly, in *United States v. Miller*, when the Seventh Circuit held that mere possession of a short-barreled shotgun is not a violent felony, the court also expressed frustration with the clause's opacity:

> The Supreme Court has addressed the residual clause four times in a recent five-year period. Perhaps no single statutory clause has ever received more frequent Supreme Court attention in such a short period of time or such a proliferation of lower court reaction. Although Congress has done nothing to add clarity to ACCA's residual clause, [cases decided recently]

> direct us to a different understanding of how to apply the residual clause.

Id. at 437 (internal footnote omitted); *see also United States v. Jones*, 689 F.3d 696, 699, 704-05 (7th Cir. 2012) ("For us to say that the residual clause is unconstitutionally vague — essentially that it lacks a coherent, ascertainable standard — would be to say that the Supreme Court failed to ascertain and apply a standard in *James*, *Begay*, *Chambers*, and *Sykes*. Justice Scalia may be right, but attributing failure to the Supreme Court is not within our authority.") The Eleventh Circuit also bemoaned the clause's intractable lack of clarity:

> However logical Justice Scalia's reasoning, and however appealing the result of that logic might be to courts, like our own, with caseloads enhanced by residual clause enhancement issues, the majority opinion in *Sykes* took the position that the ACCA residual clause states an intelligible principle and provides guidance that allows a person to conform his or her conduct to the law. The position appears to foreclose a conclusion, at least by a lower federal court such as our own, that the residual clause is unconstitutionally vague.

United States v. Chitwood, 676 F.3d 971, 978 n.3 (11th Cir. 2012) (citations and internal quotation marks omitted).

Not only do the lower courts express frustration regarding the residual clause's vagueness, but their substantive rulings, and the frequent disagreements they reflect, validate that frustration. The number of "circuit

splits" created by the vagueness of the residual clause is truly remarkable. As noted above, four of the five residual clause cases the Court has considered arose from a split among the circuits regarding whether the offense in question (attempted burglary, failure to surrender, felony fleeing, mere possession of a short-barreled shotgun) falls within the residual clause.[13] Like the Hydra of Greek mythology, each time the Court resolves a split among the lower courts regarding how to apply the residual clause to a particular sort of predicate offense, two more unresolved questions arise to take its place.

For instance, the lower courts are in current disagreement[14] about whether or not statutory rape and similar sex offenses involving minors,[15] violent offenses

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13. Only *Begay* did not arise from a split in lower court authority: instead all three courts to have ruled on the issue at the time the Court intervened had erroneously decided that felony DUI was a violent felony.

14. The disagreements discussed in this section include cases that apply the residual clauses from the ACCA's violent felony definition and the Sentencing Guidelines "crime of violence" definition. All circuits have held that the two definitions are almost entirely indistinguishable and therefore decisions regarding the application of one definition apply to cases arising from the other. *See e,g., United States v. King*, 673 F.3d 274, 279 n.3 (4th Cir. 2012); *United States v. Moore*, 635 F.3d 774, 776 (5th Cir. 2011); *United States v. Denson*, 728 F.3d 603, 607 (6th Cir. 2010).

15. *Compare United States v. Daye*, 571 F.3d 225, 229-36 (2d. Cir. 2009) (statutory rape under Vermont law is a violent felony); *with United States v. Van Mead*, 773 F.3d 429, 432-38 (2d Cir. 2014) (statutory rape under New York law not violent); *United States v. Harris*, 608 F.3d 1222, 1233 (11th Cir. 2010) (Florida offense not violent felony); *United States v. Goodpasture*, 595 F.3d 670, 672-73

involving recklessness,[16] and conspiracies to commit violent offenses,[17] are violent felonies under the residual clause. There is also disagreement regarding whether certain forms of escape from custody are violent felonies, even though this Court specifically addressed a variant of escape in *Chambers*.[18] Different courts even reach opposite conclusions when interpreting the very same

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(7th Cir. 2010) (California crime of lewd conduct with person under 14 not violent felony); *United States v. Thornton*, 554 F.3d 443, 446-49 (4th Cir. 2009) (Virginia statutory rape not violent felony); *and United States v. Christensen*, 559 F. 3d 1092, 1095 (9th Cir. 2009) (Washington statutory rape not violent felony).

16. *Compare United States v. Espinoza*, 733 F.3d 568, 572-74 (5th Cir. 2013) (Texas conviction for reckless assault constitutes violent felony); *with Jones*, 689 F.3d at 626 (Kentucky conviction for reckless homicide not violent because "reckless conduct no longer qualifies under the residual clause"). The Fifth and Sixth Circuits seem most specifically at odds regarding whether *Sykes* undermined *Begay's* continuing viability even in cases with a *mens rea* of recklessness.

17. *See United States v. Chandler*, 743 F.3d 648, 661-62 (9th Cir. 2014) (Bybee, J. concurring) (noting split among circuit courts). Petitions for certiorari in *Chandler* and another case are pending before this Court on the contentious issue of whether conspiracy offenses are covered by the residual clause. *See* Petition for Certiorari, *Chandler v. United States*, No. 14-282, and Petition for Certiorari, *Melvin v. United States*, No. 14-6510.

18. *Compare United States v. Delgado*, 320 F. App'x 286, 287 (5th Cir. 2009) (holding that, despite *Chambers*, walkaway escape is crime of violence because all escape comes with risk of harm); *with United States v. Oaks*, 665 F.3d 719, 720-21 (6th Cir. 2012) (relying on statistics to hold that escape from non-secure custody is not a violent felony), *and United States v. Lee*, 586 F.3d 859, 874 (11th Cir. 2009).

statutory provision from the same state's penal code, *compare, e.g., United States v. Brown*, 514 F.3d 256, 269 (2d Cir. 2008) (holding that violating New York's third-degree burglary statute is always a violent felony under the residual clause), *with United States v. Prater*, 766 F. 3d 501, 517 (6th Cir. 2014) (holding that same provision sometimes qualifies and sometimes does not), and when considering virtually identical provisions from different states. *Compare, e.g., United States v. Montgomery*, 402 F.3d 482, 488-89 (5th Cir. 2005) (holding Texas conviction for retaliation against government officials not violent felony because threatened harm need not be physical), *with United States v. Sawyers*, 409 F.3d 732, 742-43 (6th Cir. 2005) (treating almost identical language in Tennessee retaliation statute as a violent felony), *abrogated on other grounds by United States v. Vanhook*, 640 F.3d 706 (6th Cir. 2011). It is hard to imagine that whatever test the Court employs in the current factual context involving mere possession of a weapon will resolve even one of these disagreements among lower courts, let alone all of them.

Not only do the lower courts disagree about the violent felony status of various predicate offenses under the residual clause, but they disagree about the proper analytical framework to apply to these cases. For instance, the Fourth and Tenth Circuits reached opposite outcomes while interpreting very similar state statutes criminalizing battery of a police office, due to the courts' very different application of the "ordinary case" concept to the residual clause. *Compare United States v. Carthorne*, 726 F.3d 503, 514-515 (4th Cir. 2013), *with United States v. Williams*, 559 F.3d 1143, 1148-49 (10th Cir. 2009). In each case, the elements of the statute permit it to be violated with the "slightest touching." The Fourth Circuit,

emphasizing the essential elements, found that because the offense can be committed with minimal contact, it does not present a serious potential risk of physical injury. *Carthorne*, 726 F.3d at 514 (noting that, due to the clarity of the elements, it need not "hypothesize about unusual cases"). In contrast, the Tenth Circuit acknowledged that the elements are important, but held that the ordinary case likely involves violence rather than slight touching, and therefore the offense qualifies under the residual clause. *Williams*, 559 F.3d at 1148; *see also Van Mead*, 773 F.3d at 435 (noting it is "difficult to determine what kind of conduct and degree of risk is present in the 'ordinary' case, because it is difficult to determine what constitutes an 'ordinary' case.")

Similar disagreements regarding the proper analytical framework for residual clause review are played out every day across the country. As Judge Kozinski of the Ninth Circuit observed while grappling with the residual clause and the "ordinary case" concept, there is no simple basis in the law for determining whether "most of the cases" involve dangerous conduct: "Don't even think about how a court is supposed to figure out whether a statute is applied in a certain way 'most of the time.' (A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?)" *United States v. Mayer*, 560 F.3d 948, 951 (9th Cir. 2009) (Kozinski, J., dissenting from denial of rehearing *en banc*). This was among the concerns with the residual clause that led Judge Kozinski to worry that the panel's decision is a "train wreck in the making" that "reads the ACCA's residual clause so broadly that nearly any crime will qualify." *Id.*

To make matters worse for the twin goals of notice and consistency, some predicate offenses have led not only to disagreements at particular moments in time, but also to changing and evolving splits among the lower courts in light of this Court's intervening residual clause rulings. For instance, before *Begay*, lower courts disagreed about whether fleeing the police in a motor vehicle and similar offenses were violent felonies, with several circuits finding that they were, and one disagreeing.[19] Following *Begay*, with its "purposeful, violent and aggressive" standard, the landscape changed entirely, though lower-court agreement on the issue remained elusive. By then four circuits held that flight was a violent offense, and four disagreed.[20]

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19. *Compare Powell v. United States*, 430 F.3d 490, 492 (1st Cir. 2005) (Maine conviction for eluding police is violent felony in light of risk presented); *United States v. James*, 337 F.3d 387, 390-91 (4th Cir. 2003) (South Carolina conviction is violent felony); *United States v. Martin*, 378 F.3d 578, 582-84 (6th Cir. 2004) (Michigan conviction violent); *and United States v. Howze*, 343 F.3d 919, 922 (7th Cir. 2003) (Wisconsin conviction violent); *with United States v. Kelly*, 422 F.3d 889, 892-97 (9th Cir. 2005) (holding that the offense was not violent because the analysis focused on the "most innocent conduct" that would violate the statute).

20. *Compare United States v. Harrimon*, 568 F.3d 531, 534-37 (5th Cir. 2009) (Texas conviction for fleeing arrest purposeful, violent, and aggressive); *United States v. LaCasse*, 567 F.3d 763, 766-67 (6th Cir. 2009) (Michigan conviction is violent); *United States v. Spells*, 537 F.3d 743, 750-52 (7th Cir. 2008) (Indiana conviction qualifies because similar to enumerated crimes); *United States v. McConnell*, 605 F.3d 822, 830 (10th Cir. 2010) (Kansas conviction for fleeing and eluding police is violent); *with United States v. Tyler*, 580 F.3d 722, 725-26 (8th Cir. 2009) (Minnesota fleeing offense not violent); *United States v. Jennings*, 515 F.3d 980, 989-90, 992-93 (9th Cir. 2008) (Washington conviction not

Although *Sykes* largely resolved the dispute, questions and disagreements remain today about how to apply that seemingly straightforward holding to the reality of state laws that prohibit fleeing the police in widely different ways. *See, e.g., United States v. Smith*, 772 F.3d 680, 684-85 (11th Cir. 2014) (Martin, J., dissenting from denial of rehearing *en banc*) (disagreeing with majority's application of *Descamps v. United States*, 133 S. Ct. 2276 (2013), and with the conclusion that fleeing on foot is also violent); *United States v. Doyle*, 678 F.3d 429, 437-42 (6th Cir. 2012) (White, J., dissenting) (disagreeing with majority's holding that lower-level fleeing offense lacking element of risk is violent felony).[21]

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violent); *United States v. Harrison*, 558 F.3d 1280, 1301 (11th Cir. 2009) (holding in the context of "ever developing Supreme Court precedents" that Florida fleeing offense not violent). The Fourth Circuit strained to answer the question with respect to one state statute in South Carolina, initially holding that flight might be deemed violent in some cases, *United States v. Roseboro*, 551 F.3d 226, 242-43 (4th Cir. 2009), before finally settling on the conclusion that flight *never* constitutes a violent offense, *United States v. Rivers*, 595 F.3d 558, 560, 565 (4th Cir. 2010) (focusing on lack of the requisite intent).

21. Another example of vacillations regarding a single predicate can be found in *United States v. Snyder*, 5 F. Supp. 3d 1258, 1265 (D. Or. 2014). Because the district court found that one of his three possible predicates, attempt to elude the police, was not a violent felony, he was originally sentenced to 110 months. The government appealed and the case was remanded in light of *Sykes*. While awaiting resentencing to fifteen years as required by the ACCA, the Court issued *Descamps*. Although it did not change the status of Mr. Snyder's fleeing offense, the district court held that his "non-generic" burglary offense no longer satisfied the residual clause under the analysis required by *Descamps*. Mr. Snyder was again sentenced to 110 months.

The problem is compounded exponentially by the fact that each of this Court's rulings interprets an individual state's particular statute, not an imagined generic version of an offense. As *James* made clear,[22] each residual clause inquiry begins with the elements: the *Sykes* Court grappled with a particular subsection of Indiana law rather than the general idea of fleeing the police, and *Chambers* contemplated a multi-faceted Illinois statute that dealt with several sorts of escape rather than a generic offense. Each of this Court's decisions provides guidance when examining another state's similar offense, particularly when the two statutes are alike in design. However, the Court's decisions do not answer whether another statute contemplates a violent felony when two different state statutes share nothing more than a name. The statute-by-statute variability created by the residual clause will only increase in the future, due to the renewed emphasis on the elements and structure of each state offense mandated by *Descamps*, 133 S. Ct. 2283.

In sum, Justice Scalia's prediction from 2007 has come true, as demonstrated by the lower courts' never-ending struggle to discern a clear standard of application for the residual clause.

> Thus for what is probably the vast majority of cases, today's opinion provides no guidance whatever, leaving the lower courts to their own devices in deciding, crime-by-crime, which conviction 'involves conduct that presents a serious potential risk of physical injury to

22. *James*, 550 U.S. at 201-02; *see also Moncrieff v. Holder*, 133 S. Ct. 1678, 1684-87 (2013).

> another.' It will take decades, and dozens of grants of certiorari, to allocate all the Nation's crimes to one or the other side of this entirely reasonable and entirely indeterminate line.

James, 550 U.S. at 216 (Scalia, J., dissenting).

B. The Vagueness of the Residual Clause Violates Due Process.

The incomprehensible language of the text, this Court's unsuccessful efforts to articulate a broadly applicable test, the discord in the analyses applied and outcomes reached by the lower courts for more than a decade, and Congress' failure to fix the problem all demonstrate the vagueness of the residual clause. What is also clear is that the provision's ambiguity is so significant and so intractable that it violates the Due Process Clause of the Constitution.

1. The Vagueness Doctrine Protects Due Process.

The "vagueness doctrine," bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application." *Connally*, 269 U.S. at 391. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (noting that the "requirement of clarity" is mandated by the Due Process Clause); *City of Chicago v. Morales*, 527 U.S. 41,

56 (1999) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.")

The doctrine of vagueness serves at least three constitutionally essential goals. First, citizens are entitled to know what the law says, in terms that are clear enough to follow and understand. "Living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). As the Court explained in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *See also McBoyle v. United States*, 283 U.S. 25, 27 (1931) (requiring "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.").

A second critical due process concern raised by vague statutes is that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory manner." *FCC v. Fox*, 132 S. Ct at 2317. Indeed, the Court has suggested that this aspect of vagueness doctrine, "the requirement that a legislature establish minimal guidelines to govern law enforcement," is more important to due process concerns than notice. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting

Smith v. Goguen, 415 U.S. 566, 574 (1974)). Vague statues "permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. at 575)).

The lack of clarity created by vague statutes leads to arbitrariness by courts and judges as well as law enforcement. In *United States v. L. Cohen Grocery Co.*, the Court found vague a statute that prohibited charging "any unjust or unreasonable rate" for necessities, without specifying what conduct would qualify. *Cohen Grocery*, 255 U.S. 81, 89-90 (1921). The law gave too much discretion and too little guidance to judges, leaving it to courts and juries to determine whether a particular price would be unreasonable. *Id.* In demonstration of the arbitrariness permitted by the vague language, the Court highlighted the conflicting tests and outcomes among lower courts grappling with the provision. *Id. See also Grayned*, 408 U.S. at 109 (describing vague statutes as improperly vesting "policemen, judges and juries" with the duty to resolve questions "on an ad hoc and subjective basis"); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966) (warning against a law so "vague and standardless" that it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.").

Third, the constitutional mandate that statutes be drafted with clarity protects the essential separation of powers among the three branches of government. In 1890, the Court described the already long-standing doctrine of strict construction as being based, in part "on the sound principle that it is for the legislature, not the court, to

define a crime and ordain its punishment." *United States v. Lacher*, 134 U.S. 624, 629 (1890).

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

United States v. Reese, 92 U.S. 214, 221 (1875); *see also United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997) ("The fair warning requirement also reflects the deference due to the legislature, which possesses the power to define crimes and their punishment.")

Each of the concerns that require vague statutes to be declared unconstitutional applies with even greater force in the context of criminal statutes. *See Connally*, 269 U.S. at 393 ("A criminal statute cannot rest upon an uncertain foundation. . . . Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirement and the courts upon another."). This is because "the consequences of imprecision are qualitatively less severe" in statutes involving civil penalties than in criminal statutes. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982); *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) (suggesting that the "undeniably opaque" terms at issue in the statute would raise "substantial vagueness concerns" in criminal statute). Indeed, the more significant the

criminal sanction, the more searching a court's analysis must be. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 46 (1991) (O'Connor, J., dissenting) ("Our scrutiny under the vagueness doctrine intensifies, however, in proportion to the severity of the penalty imposed . . . .") (citations omitted).

These constitutional considerations are equally offended by vague sentencing statutes. In *United States v. Evans*, 333 U.S. 483 (1948), the Court considered a criminal statute that had vague and poorly written sentencing provisions. The Court rejected the government's invitation to disregard the flaws in the statute because they impacted only the penalty and not the law's prohibitions. *Id* at 485. The Court found that, although it was given the task of interpreting all aspects of criminal law, even when their drafting was less than precise, it could not be asked to go as far as rewriting the penalty provisions entirely.

> But strong as the presumption of validity may be, there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial functions.

Id. at 486.

Similarly, in *United States v. Batchelder*, 442 U.S. 114, 123 (1979), the Court made clear that the vagueness doctrine could apply to a sentencing statute, even when the

illegality of the conduct at issue was not in question. "So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *See also United States v. Brown*, 333 U.S. 18 (1948) (considering a vagueness challenge to a poorly drafted sentencing provision for escape). *But cf. Chapman v. United States*, 500 U.S. 453, 467-68 (1991) (rejecting vagueness challenge to a mandatory minimum sentencing statute, and suggesting that concerns about the vagueness of sentencing provisions are less than concerns about the vagueness of criminal prohibitions themselves.)[23] Against this doctrinal backdrop, the constitutional flaws of the residual clause become clear.

2. The Residual Clause Fails to Provide Notice to Citizens, to Defendants, Even to Attorneys.

The residual clause, which remains enigmatic, fails to do what the Constitution requires: "provide a person of ordinary intelligence fair notice." *Williams*, 553 U.S. at 304. If this Court has been unable to create an intelligible principle of application for the residual clause, an average citizen stands little chance of accurately assessing his own criminal history and predicting whether it will expose him to the enhanced penalties of the ACCA through its "catch-all" clause. The Court's increasing reliance on statistics

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23. Although this Court has twice addressed the vagueness of the residual clause (though never after briefing and argument), in *James* and *Sykes*, and each time declined to find it was unconstitutionally vague, in neither case did the Court even hint that the doctrine is inapplicable to the residual clause because it is part of a sentencing provision.

exacerbates, rather than lessens, the unconstitutional lack of notice created by the vagueness of the residual clause. No citizen can be expected, not only to read the law itself and the meaning given it by the courts, but also to conduct searching statistical analysis to determine whether the offenses in their criminal history might count as violent felonies under the residual clause. "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *Cardiff*, 344 U.S. at 176.

The unconstitutional lack of notice created by the vagueness of the residual clause is even more dramatic due to vacillations created by this Court's frequent efforts to create a clear rule governing its application. Because the standards for applying the clause seem to be in constant flux, clarity and predictability are never achieved. Even once a prosecution for a violation of § 922(g) is underway, it is often difficult to predict whether a defendant's criminal history will trigger application of the ACCA.

Imagine an attorney trying to advise a defendant from the District of Minnesota whose status as an Armed Career Criminal hinges on one conviction in his criminal history, felony fleeing in violation of Minnesota law. Were he facing sentencing for being a felon in possession of a firearm in 2005, his counsel would have advised him that the residual clause did not include his prior offense due to its "plain" language. That advice would have become less confident over the years because by 2008, she would have known that *James*' risk analysis was difficult to interpret and fleeing the police had been deemed a violent felony in four other Circuits, though the Eighth Circuit had not yet ruled. *See* notes *19 - 21, supra.* Even after *Begay*,

she would have remained unable to predict whether her client was facing no more than ten years or fifteen to life. At last, on September 4, 2009, the Eighth Circuit ruled in *United States v. Tyler* that under *Begay*, fleeing the police in Minnesota was not a crime of violence.[24] Between late 2009, therefore, and the grant of review in *Sykes* one short year later, a learned attorney could have confidently advised her client that he would face no more than ten years in prison. Although the Court's decision to hear *Sykes* and the subsequent opinion would have shown that the *Tyler* decision was vulnerable, until the Eighth Circuit held that the reasoning of *Sykes* applied to Minnesota's unique iteration of felony fleeing in October 2012, that outcome and her advice were uncertain.[25] For a time, the attorney could again confidently advise her client, this time that he would be facing at least fifteen years in prison. However, after the Court decided *Descamps* in June 2013, the certainty of her advice weakened once again as the divisibility of the Minnesota statute was called into question.[26] One year later, the Eighth Circuit confirmed that, although the issue merited "careful consideration," *Descamps* did not require it to change directions.[27] Once again, the attorney's advice became clear regarding whether Minnesota's fleeing the police satisfied the residual clause.

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24. *United States v. Tyler*, 580 F.3d 722 (8th Cir. 2009) (holding felony fleeing is not a crime of violence under the residual clause of the guidelines definition of crime of violence).

25. See *United States v. Bartel*, 698 F.3d 658 (8th Cir. 2012).

26. *Descamps v. United States*, 133 S. Ct. 2276 (2013).

27. *United States v. Pate*, 754 F.3d 550, 554 (8th Cir. 2014).

This single realistic hypothetical example demonstrates plainly how little guidance the residual clause provides, even to an attorney who makes a careful study of the clause's scope. It proves even more clearly that a regular citizen does not have notice of the provision's parameters. And this example is, in reality, played out in countless cases across the country, often in cases even more complex because not one but two or three of a defendant's predicate offenses potentially fall within the fluid borders of the residual clause.[28]

It is almost beyond dispute at this point that the residual clause "fails to give a person of ordinary intelligence fair notice" that he might be covered by the ACCA's massive sentencing enhancement. *Papachristou*, 405 U.S. at 162 (citations omitted). As the Court admonished long ago: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta*, 306 U.S. at 453. The residual clause's vagueness violates this essential rule.

3. The Residual Clause Encourages Arbitrary and Subjective Decisions by Judges and Prosecutors.

The vagueness of the residual clause leads to arbitrary and subjective decisions by courts around the country. In addition, no clear limitations are placed on prosecutors,

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28. The above example was also made simpler by the fact that the Minnesota fleeing provision at issue in *Tyler*, *Bartel* and *Pate*, has received frequent attention from the Eighth Circuit. Many state criminal statutes are examined less often in the residual clause context, providing even less notice about whether they are included in the residual clause's definition or not.

who can argue that almost any prior felony in a defendant's history qualifies for residual clause treatment, radically increasing that person's possible sentence. As explored above, the vague language of the clause has led to a seemingly case-by-case assessment on the part of this Court and lower courts alike trying to determine whether a particular state's predicate offense falls within its boundaries. When a judge must rely on "common sense," shaky statistics, and changing mandates from this Court in the place of clear and specific statutory language, the resulting decisions are "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306. When applying the residual clause to predicate offenses leads not only to so many different results across the circuit courts, but also to substantially different analytical approaches as well, it is hard to contest that the residual clause fails to guide courts or prosecutors. And each of these disagreements worsens the unfair reality that defendants with identical criminal histories are serving vastly different sentences depending on the court in which they were prosecuted. As warned of in *Giacco*, a law such as this violates due process if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giacco*, 382 U.S. at 402-03.

The arbitrariness and inconsistency permitted by the residual clause's lack of guidance is arguably made worse by the fact that judges must interpret and apply its dictates without assistance from juries. Recidivist enhancements are not subject to the protections of the Sixth Amendment and the *Apprendi v. New Jersey* jurisprudence; the decision regarding whether the

ACCA's significant penalties apply is made by a district court judge because, in theory, she is not finding facts but merely noting the existence of earlier convictions that presumably comported with the Constitution. *See, e.g., Apprendi*, 530 U.S.at 487-88; *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Shepard v. United States*, 544 U.S. 13, 25-26 (2005) (acknowledging possible Sixth Amendment concerns raised by courts not following narrow categorical assessment). However, given the lack of direction provided by the residual clause, the assumption that underpins *Almendarez-Torres* becomes less reliable. Judges are tasked with making very subjective and factual determinations every time they are asked to rule upon whether a particular state's specific offense satisfies the residual clause: the lack of guidance provided to courts by the text raises not only due process concerns, but begins to raise Sixth Amendment concerns as well.

4. The Residual Clause Represents an Abdication By Congress and Violates Separation of Powers.

A final but serious constitutional problem created by the intractable vagueness of the residual clause is that it threatens the separation of powers protected by our Constitution. Of course, the relationship between the Court and Congress is designed to be a healthy reciprocal one, where Congress strives to draft a law with sufficient clarity and the Court strives to interpret it in a way that gives voice to congressional intent.

> For where Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not altogether

> omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evidence purpose. This is as true of penalty provisions as it is of others.

Evans, 333 U.S. at 486; *see also Skilling v. United States*, 561 U.S. 358, 403 (2010) (noting that "our case law's current . . . requires us, if we can, to construe, not condemn, Congress' enactments"). However, there are constitutional limits beyond which the Court should not go in attempting to salvage a poorly drafted law, and the residual clause has already taken the Court to those limits and, respectfully, beyond. The Court has used every tool in its interpretive tool box, from "plain" language to classic rules of statutory interpretation, from legislative history to reliance on statistics: none have made clear what Congress did not.

What makes the residual clause different is that despite abundant notice regarding its serious flaws and the clear legal morass surrounding its application, Congress has not acted to fix it, plainly casting a "net large enough to catch all possible offenders" and leaving it to the Court to sort it out. *Reese*, 92 U.S. at 221. Congress has not attempted to fix the ACCA's most embattled language; indeed, no changes to the residual clause have been seriously considered by Congress since its adoption in 1986.[29]

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29. Only one bill has been proposed during this time that would alter the definition of "violent felony." In 2010, Senator Arlen Specter offered Senate Bill 4045, which would have eliminated the categorical approach and allowed courts to examine the facts underlying a prior offense to determine whether it met the

Congress' silence on this matter stands in contrast to its willingness, in other cases, to promptly fix criminal statutes after the Court has found fault with them, adopted a limiting interpretation with which Congress did not agree, or declared them vague. For instance, in 1995, the Court considered 18 U.S.C. § 924(c), which punished a person who "uses or carries" a firearm during a drug crime or crime of violence, *see Bailey v. United States*, 516 U.S. 137 (1995), and adopted a narrowing definition of "use." By 1998, Congress had amended the statute to clarify its meaning; it took swift action although the Court had only applied a narrowing reading, had interpreted "use" only twice in ten years, and no member of the Court had even hinted at the statute's vagueness. Congress also responded quickly to include deprivation of honest services within the mail fraud statute after the Court applied a narrowing interpretation. *See Cleveland v. United States*, 531 U.S. 12, 19-20 (2000) (describing the congressional amendment of fraud statutes in 1988 as response to *McNally v. United States*, 483 U.S. 350, 359-360 (1987)); *see also* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f) (1), 123 Stat. 1617, 1618 (codified at 18 U.S.C. § 1956) (altering the definition of "proceeds" in the money laundering statutes in light of *United States v. Santos*, 553 U.S. 507, 514 (2008)).

Congress' lack of action to remedy the clear flaws in the residual clause stands in marked contrast to these examples. The opinions of various members of

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definition of violent felony. Although the proposed legislation only slightly changed the text of the residual clause at all, it would have expanded other parts of the violent felony definition and added additional enumerated offenses. The bill was referred to Committee, and no further action was taken.

the Court have advised Congress on several occasions that the residual clause is "ill-defined," and suffers from "shoddy draftsmanship;" that it "calls out for legislative clarification" that "only Congress can rescue the federal courts" from its "mire;" and that as a result it is incurably vague. *See* Section A(2), *supra*. And yet Congress has not responded.

The Court must not continue, at expense of the due process the Constitution affords to all citizens, to strive to find specific and precise meaning where none exists.

> This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law.

Evans, 333 U.S. at 495.

Two previous decisions provide guidance regarding the healthy give-and-take that the Constitution requires from Congress, and demonstrate the propriety of acting in the absence of that essential reciprocity. In *Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010), the Court rejected a pre-enforcement vagueness challenge to a statute criminalizing the provision of material support to terrorist organizations. In addition to finding that the statute's language was sufficiently clear, the Court noted that Congress "took care to add narrowing definitions to the statute . . . over time." *Id.*

In *United States v. Evans*, in contrast, the Court considered the poorly drafted penalty provision of a criminal statute and found that it was unsalvagably muddled. The Court noted, with a hint of frustration, that Congress had been asked repeatedly by the "Commissioner General" to fix the statute with the same corrective language that the government was now asking the Court to read into the statute, and had failed to act. *Id.* at 491-492.

> These efforts were made as conflicting judicial decisions demonstrated that the courts were very much at sea and their floundering was brought to congressional attention. In each instance nevertheless the effort was unsuccessful.

Id. at 492. After observing that too much would be required to fix the poorly drafted portions of the statute through interpretation, the Court concluded: "This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make." *Id.* at 495. The Court found the statute vague despite the fact that it had never previously attempted to interpret it. *See also Todd v. United States*, 158 U.S. 278, 283-84 (1895) (noting that Congress could have adopted the interpretation advocated by the government, "but it has not as yet seen fit to do so.")

The present case is very similar to *Evans* in this respect. Congress not only drafted a flawed provision when it adopted the residual clause in 1986, but it has been "on notice" of the problems with the residual clause

for years, and has not responded to frequent polite requests from members of the Court to revise it. The Court should now end the polite requests and speak with the power the Constitution gives it to declare the statute unconstitutionally vague.

C. The Residual Clause Is Unconstitutional As Applied To Samuel Johnson, And On Its Face.

Samuel Johnson urges the Court to declare the residual clause of the Armed Career Criminal Act "void for vagueness." At a minimum, the clause should be declared unconstitutionally vague as it applies to him and the predicate offense of mere possession of a short-barreled shotgun. But he also urges that the Court should take the admittedly unusual step of declaring the entire clause unconstitutional across the board.[30]

1. As Applied to Samuel Johnson and Mere Possession of a Short-Barreled Shotgun, the Residual Clause Is Unconstitutional.

The residual clause is unconstitutionally vague as applied to Samuel Johnson, and his predicate offense of possession of a short-barreled shotgun. As explored in the first round of briefing and argument, nothing in the text

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30. Mr. Johnson urges the Court to strike down, not the entire ACCA, nor even the entire definition of "violent felony," but only that part of the definition that offends the Constitution. This narrowly prescribed remedy means that being a felon in possession of a firearm will remain a crime and the severe penalties of the ACCA will remain available through application of other parts of the violent felony definition, where appropriate. Only the unconstitutional portion of § 924(e)(2)(B)(ii) must go.

of the statute, in the legislative history, or in this Court's earlier proclamations put Mr. Johnson on notice that his 2007 conviction for mere possession of the weapon would one day count as a "violent felony." This is so because the offense contains no element of force, is not an enumerated offense, involves mere possession, and involves conduct that is widely legal. In fact, the only textual clue present in the residual clause regarding mere possession of a short-barreled shotgun suggests that because "*use* of explosives" is specifically included, mere *possession* of a weapon would not be.[31] Indeed, each of the Court's previous decisions on the residual clause would suggest to Mr. Johnson that this particular conviction does not count as violent because there is no evidence that a mere possession offense, when examined properly on its own elements, presents even close to the degree of risk created by the enumerated offenses. Moreover, the offense – one of near strict liability at the time Mr. Johnson committed it and likely still today – fails to satisfy any part of *Begay's* purposeful, violent and aggressive test.

In order for the government to argue that mere possession of a short barreled shotgun is covered by the residual clause, it had to propose a new test by which the Court would imagine dangerous offenses that might follow eventually from the offense actually at issue. This test, if adopted by the Court, has no apparent limitations and would render the residual clause even more vague than it already is. And an after-the-fact new test would indeed violate constitutional notice requirements if applied to Mr. Johnson. *See F.C.C. v. Fox*, 132 S. Ct. at 2320 (2012) (striking down regulations as unconstitutionally vague

31. *See* Petitioner's Opening Brief, p. 24.

as applied in part because the decision that conduct was covered came after the conduct itself).

The residual clause is therefore vague as applied to Mr. Johnson because, based on an examination of his case alone, the flaws in the clause are clear. The statute's text and the Court's tests do not clearly include mere possession of a short-barreled shotgun within their coverage and the lower courts are deeply divided about the violent status of this offense, with more courts agreeing that it should not count than finding that it should.

Plainly, this is not a case where Mr. Johnson is unambiguously included within the scope of the residual clause, and therefore looks to imagined cases on the margins of the statute to support an otherwise unavailing claim of vagueness. *See Humanitarian Law*, 561 U.S. at 18-19 (citing *United States v. Raines*, 362 U.S. 17, 21-22 (1960). Instead, Mr. Johnson is standing beyond the edge of the grey area or blurry margin of the residual clause, far from its heartland, and the Constitution prohibits application of its dictates to him. Therefore, he urges the Court to, at a minimum, vacate his ACCA sentence and remand for resentencing. *See Skilling*, 561 U.S. at 424 (Scalia, J., concurring) (noting proper remedy is holding that statute is vague as applied and vacating conviction).

2. The Residual Clause Is Unconstitutionally Vague Across the Board.

The Court should also declare the residual clause of the ACCA facially unconstitutional because its fatal vagueness violates due process. For three reasons, this admittedly significant remedy is called for in this case.

First, although the Court has expressed a preference for "as applied" challenges, it has also used the power given to it by the Constitution to strike down statutes that are fatally vague. In *Chicago v. Morales*, for instance, the Court struck down a Chicago ordinance designed to control gang activity rather than simply ruling it invalid as applied to the defendants before the Court. 527 U.S. at 64-65 (plurality opinion). It did so although the ordinance did not infringe on recognized First Amendment rights. *Id.* at 55; *see also Giacco*, 382 U.S. at 402 (facially striking down a statute as vague because it raised concerns about arbitrary enforcement). In *Kolander v. Lawson* the Court asserted that in fact it had, "at times. . . invalidate[d] a criminal statute [for vagueness] on its face when it could conceivably have had some valid application," and struck down the statute before it as "unconstitutionally vague on its face." 461 U.S. at 358 n.8, 361.

In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Court suggested that a facial attack in any context can only succeed if the petitioner establishes that "no set of circumstances exists under which the Act would be valid." However, *Salerno's* absolutist characterization has been described as "dictum" by members of the Court, *see Morales*, 527 U.S. at 55 n. 22 (Stevens, J.), and commentators alike.[32] Even after *Salerno*, the Court

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32 *See also Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175 (1996) (Stevens, J., dissenting from denial of certiorari) (labeling the *Salerno* formulation dicta and inaccurate). At least one prominent commenter has suggested that the Court does not follow *Salerno's* sweeping proclamation. *See* Richard Fallon, *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915 (2011) (reviewing several years of Supreme Court cases and showing that successful facial challenges are not and should not be rare);

has invalidated statutes facially for vagueness. *See e.g., Chicago v. Morales*, 527 U.S. 41 (1999).

It appears that the Court's reservations about facial challenges are most pronounced when they arise during pre-enforcement litigation attempting to block the future use of a law rather than during a challenge to an already-underway application of the law to a particular case. *See, e.g., Humanitarian Law,* 561 U.S. at 18-20 (discussing the "as-applied" vs. facial dichotomy while addressing a pre-enforcement challenge to a criminal statute). Needless to say, neither Mr. Johnson's case nor the dozens of other residual clause cases referenced today are pre-enforcement challenges: in every instance, a defendant has been charged with a crime and the government has sought application of the ACCA's massive penalties through operation of the residual clause.

Second, given this Court's unique history of efforts to interpret the residual clause combined with Congress' unwillingness to assist in the enterprise, concerns of constitutional avoidance and deference to separation of powers that motivate the preference for as applied challenges are significantly lessened.[33] Certainly, the Court hesitates to grant facial vagueness challenges in

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see also Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 261-62 (1994).

33. *See* Retired Justice Sandra Day O'Connor, *Forward: The Rule of Law and Civic Education*, 62 SMU L. Rev. 693, 695 ("[L]egislators and regulators must provide citizens with fair notice of the laws they are expected to follow. If lawmakers fail to do so, judges must invalidate these laws and regulations as unconstitutionally vague.")

part because the Court avoids sweeping proclamations when narrower ones will do. *See, e.g., Skilling*, 561 U.S. at 403-04. However, here, judicial economy and due process would both be served by the Court making a more definitive decision. Otherwise, as-applied challenges will proliferate in the same way that challenges based on particular state statutes have.

Finally, the clause is arguably vague in all of its applications, satisfying even the most stringent *Salerno* standard. *See Salerno*, 481 U.S. at 745. Given the lack of clarity in the text and its resistance to consistent interpretation, the residual clause provides neither notice nor limiting principles for its application. Admittedly this Court has twice before held that individual state's specific offenses fall within the residual clause's dictates in *James* and *Sykes*. However, even those two decisions arose from circuit splits, led to split decisions and gave rise to dissents regarding vagueness. And in neither of those cases was the Court able to apply a clean and definite interpretation to the residual clause. In *Begay* and *Chambers* the Court decided that the clause did not cover the offense in question, though again there were strong differences of opinion, and the *Johnson* case appears to be continuing this trend. Frankly, it is difficult to imagine an offense that is non-controversially and plainly included within the residual clause's dictates in light of the clause's nebulous language and this Court's evolving jurisprudence.

The reluctance to grant facial challenges is in part due to the Court's aversion to resting decisions of constitutional magnitude on hypothetical scenarios. *Hill v. Colorado*, 530 U.S. 703, 733 (2000). But given the countless very real predicate offenses arising from every

district in the nation, the Court need not reach out for imagined situations in order to assess the broad vagueness of the provision. Mr. Johnson urges the Court that he has established that the residual clause is vague in all of its applications, including the real application currently before the Court, the real cases that have come before, and the real questions that have yet to be answered.

Certainly the Court's power to declare a statute unconstitutionally vague is "strong medicine" to be used sparingly.[34] This case, however, calls out for that strong medicine.

34. *See NEA v. Finley*, 524 U.S. 569, 580 (1998) (noting that facial invalidation of a statute as unconstitutionally vague is "strong medicine" which should be "employed by the Court sparingly").

CONCLUSION

Samuel Johnson asks the Court to vacate his ACCA enhanced sentence and remand for resentencing. At a minimum, the Court should determine that mere possession of a short-barreled shotgun is not a violent felony either because it is simply not included within the residual clause or because that clause is unconstitutionally vague as to him. Mr. Johnson also urges the Court to strike down the residual clause as facially invalid.

Dated: February 18, 2015

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SUPPLEMENTAL BRIEF

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SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR THE PETITIONER

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SUMMARY OF ARGUMENT

The residual clause of the ACCA is unconstitutionally vague. The Court's concerted efforts to impart predictable meaning to the clause's flawed language have resulted in a patchwork doctrine, guaranteeing continued confusion in the lower courts and an unending stream of residual clause cases on this Court's docket. Although other statutes use similar risk-based phrasing, none present the same textual, analytical, and jurisprudential difficulties. Voiding the residual clause is squarely supported by vagueness doctrine, and the principle of stare decisis should not tie the Court's hands. In light of its unique history, the Court should declare the residual clause void for vagueness.

ARGUMENT

I. THE VAGUENESS OF THE RESIDUAL CLAUSE VIOLATES DUE PROCESS.

The residual clause is unconstitutionally vague. Its unclear text requires courts to apply speculative risk analysis categorically to a vast array of state crimes without any explicit connection to the elements of those offenses. Although this Court has issued four opinions since 2007 trying to compensate for the clause's vagueness, it has not succeeded in creating a useful interpretive framework, leading to turmoil in the lower courts. Vagueness doctrine squarely applies to the residual clause and renders it unconstitutional.

A. The Court's Jurisprudence Has Not Cured the Residual Clause's Vagueness.

The residual clause's vagueness has led to discord within this Court's jurisprudence and disagreement and frustration throughout the lower courts. The government claims that *Sykes v. United States*, 131 S. Ct. 2267 (2011), has both paved way for clarity in applying the residual clause and marginalized this Court's decision in *Begay v. United States*, 553 U.S. 137 (2008). Although this idealized version of residual clause jurisprudence may cohere in theory, it falls apart in practice. Every one of the circuit court opinions expressing profound frustration with the residual clause's vagueness came after *Sykes*. (Pet. Supp. 26-28, 32.) It cannot be that seasoned jurists from many circuits are expressing serious dissatisfaction with the vagueness of the residual clause based on nothing more than a failure to properly understand *Sykes*.

Entrenched disagreements among the lower courts remain today that will not be answered by the Court's decision regarding the violent felony status of mere possession of a short-barreled shotgun. Closer examination reveals that even the "easy cases" referenced by the government as readily falling within the residual clause are not uniformly settled. And the ordinary case doctrine as broadly interpreted by the government exacerbates the vagueness of the residual clause, giving less guidance to lower courts rather than more.

1. The Court's Jurisprudence Does Not Establish an Easily Applied Residual Clause Framework.

Each of the Court's four previous residual clause decisions has, in an attempt to address a specific predicate offense, led to a different analytical approach. Although *Sykes* represents the most recent effort by this Court to compensate for the clause's vagueness, it does not go "a long way toward dispelling the potential confusion" created by its inscrutable language. (Govt. Supp. 38.) Rather than unifying this Court's residual clause jurisprudence into a single framework, *Sykes* raises even more questions. For instance, although the *Sykes* majority opinion suggests that *Begay's* consideration of the nature of a predicate offense is most relevant to cases involving mens rea ranging from strict liability to recklessness, *Sykes*, 131 S. Ct. at 2275-76 (2011), the dissents both suggest a very different understanding of the continuing relevance of *Begay*. *See Sykes*, 131 S. Ct. at 2285 (Scalia, J., dissenting); *Id.* at 2289 n. 1 (Kagan, J., dissenting). While the "purposeful, violent and aggressive" test may not have been necessary to the Court's decision in *Sykes*, it is difficult to see how the Court could have reached any decision in *Begay* itself without that guidance, given the opinion of five Justices that drunken driving is extremely risky but should not trigger the ACCA. And *Begay* is not alone among this Court's residual clause decisions in considering the qualitative nature of the predicate offense; the Court also considered the *Begay* framework in *Chambers v. United States*, 555 U.S. 122, 128 (2009), which addressed a plainly intentional offense. *See Sykes*, 131 S. Ct. at 2289 n. 1 (Kagan, J., dissenting).

The lower courts likewise do not all agree that *Sykes* sidelined any qualitative assessment of predicate offenses in most cases. For instance, in *United States v. Denson*, 728 F.3d 603, 610 (6th Cir. 2013), the Sixth Circuit noted the tension in this Court's jurisprudence and observed that it treats the *Sykes* language regarding *Begay* as "not mandatory," so a qualitative assessment remains relevant, even in cases involving purposeful mens rea. *See also United States v. Martin*, 753 F.3d 485, 490 (4th Cir. 2014) (noting that "in this circuit...we have continued, even after *Sykes* to apply *Begay's* similar-in-kind requirement to residual-clause cases.") And even were it settled that the "purposeful, violent and aggressive test" now only applies to offenses with lesser degrees of mens rea, countless questions remain about the way it should operate in such cases. (Pet. Supp. 30 n. 16) (detailing disagreement about status of seemingly violent crimes with recklessness mens rea).[1] Accordingly, *Sykes* has not unified the residual clause's interpretive landscape as the government suggests; perhaps it has actually led to more confusion. In reality, each of the Court's residual clause decisions resolved the question then before it, but those disparate opinions fail to cohere into a workable framework that cures the clause's inherent vagueness.

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1. In support of its efforts to sideline *Begay*'s qualitative test, the government renews its argument that the Minnesota offense of possession of a short-barreled shotgun has a knowing mens rea, citing *State v. Salyers*, 858 N.W. 2d 156 (Minn. 2015). (Govt. Supp. 52.) However, that decision does not support the government's position because the court did not address whether the defendant had to know of the characteristics of the weapon that rendered it unlawful. (Pet. Rep. Br. 15-20).

2. Lower Courts Are Enmeshed in Frustration and Disagreement.

Not only did *Sykes* fail to unify this Court's residual clause jurisprudence, it also did not resolve the disagreements and frustration in the lower courts. Mr. Johnson identified numerous conflicts among the lower courts — ranging from retaliation against government officials, to conspiracy, to crimes involving reckless harm — that remain today and will not be answered by the present case. (Pet. Supp. 29-34.) The government's suggestion (Govt. Supp. 48) that these disagreements would vanish if lower courts would just properly apply the government's understanding of *Sykes* is an oversimplification of the reality on the ground.[2] If *Sykes*, decided four years ago, were going to bring uniformity to residual clause analysis, it surely would have done so by now.

The government references "easy cases" which purportedly demonstrate the lack of disagreement among lower courts. (Govt. Supp. 8-9, 44, 45.) However, even some of these carefully selected cases are revealed to be neither easy nor settled on closer examination. For instance, although child abuse in violation of Missouri law has been found to be a violent felony (Govt. Supp.

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2. In its effort to minimize the confusion wrought by the residual clause, the government dismisses one clear disagreement among the Circuits by confidently asserting that the Sixth Circuit simply got it wrong, and the government might seek to "correct" that with en banc review in the future. (Govt. Supp. 47.) This disagreement proves the point: courts, parties and counsel are unable to achieve uniform application of the residual clause due to its vagueness.

44), child abuse under Florida law was found not to fall categorically under the residual clause. *See, e.g., Spencer v. United States*, 727 F.3d 1076 (11th Cir. 2013), *vacated on reh'g en banc on procedural grounds*, 773 F.3d 1132 (11th Cir. 2014). Similarly, although the government refers to resisting arrest as being among offenses that clearly count and "do not pose hard questions under the residual clause" (Govt. Supp. 9 & 45), the Sixth Circuit has held that resisting arrest in violation of Michigan law is not categorically covered by the residual clause. *See United States v. Mosley*, 575 F.3d 603, 607-608 (6th Cir. 2009); *United States v. Wilson*, 501 F. App'x 499, 501 (6th Cir. 2012) (affirming *Mosley's* analysis in the wake of *Sykes*).[3] Likewise, "possession of a weapon in prison" is identified by the government as obviously violent. (Govt. Supp. 9.) However, not only does *United States v. Polk*, 577 F.3d 515, 518-20 (3d Cir. 2009), remain good law and reflect a continuing circuit split, but a more recent appellate case included possession of a weapon in prison within the residual clause only over a well-reasoned post-*Sykes* dissent. *United States v. Mobley*, 687 F.3d 625, 632 (4th Cir. 2012) (Wynn, J., dissenting).

In sum, the Court should not dismiss longstanding conflicts and strong disagreements as mere aberrations because even cursory study reveals similar dissonance in nearly every "easy" topic the government cites. Rather,

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3. Indeed, the Massachusetts resisting arrest statute discussed in the case relied upon by the government, *United States v. Weekes*, 611 F.3d 68, 72-73 (1st Cir. 2010), presents a uniquely "easy" situation, but not because the offense sounds violent. Instead, it should qualify because it requires either use or threat of force or substantial risk of bodily injury *as an explicit element* of the offense.

these disagreements reflect how the vague residual clause operates in reality, spawning judicial discord everywhere.

3. The "Ordinary Case" Approach Advocated By the Government Complicates Rather Than Simplifies.

Although the "ordinary case" concept was designed to make applying the residual clause more consistent and less speculative, the reality has been the opposite. (Pet. Supp. 32.) The government, striving to explain away the problems caused by the residual clause's vagueness, suggests that choosing the hypothetical ordinary case is a simple matter of judges consulting "their deep well of experience reviewing criminal convictions and sentencing decisions, fortified by reported decisions, the determinations of the Sentencing Commission, legislative judgments, and empirical data to make a commonsense judgment about what conduct underlies the ordinary conviction." (Govt. Supp. 40.) Despite the superficial appeal of this tidy list, upon closer examination it fails to bring clarity to a complex problem.

The government's position from earlier briefing in this case amply demonstrates that its hypothetical checklist for selecting the "ordinary case" often does not answer the question. For instance, none of the items listed above support the bald assertion that the ordinary case of possession of a short-barreled shotgun is possession "to threaten, maim and kill other people." (Govt. Supp. 53.) No empirical data was presented by the government that could help a court select a representative "ordinary case," and indeed empirical data is often unavailable. Likewise, most of the lower court decisions to which the Court's

attention has been directed addressing convictions for possession of this weapon describe mere possession and nothing more.[4] (Pet. Rep. Br. 14.) Similarly, "legislative judgments" largely support Mr. Johnson's position because possession of a short-barreled shotgun is often legal and increasingly common, undermining the claim that citizens or governments agree it is a weapon without legitimate purpose. Even the Sentencing Commission's work fails to support the government's view.[5]

Therefore, the predicate offense currently before the Court proves that the "simple" approach to selecting the ordinary case advocated by the government falls short in real application. Indeed, the government's radical expansion of the ordinary case doctrine in this case exposes the lack of limits provided by the vague residual clause.

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4. The government notes that the relevant pool for consideration is the "subset of violations whe[illegible]he offender has been apprehended, prosecuted and convicted" of the offense at issue. (Govt. Supp. 40.) Therefore, the parade of horribles from the government's first Brief detailing sixteen cases describing crimes committed with short-barreled shotguns should play little role in this Court's analysis, because only two of those cases actually involved convictions for possession of a short-barreled shotgun. (Pet. Rep. Br. 8.)

5. As noted in oral argument, when the Commission decided, in 1991, that being a felon in possession of a firearm should not count as a crime of violence under the guidelines' residual clause, it based that conclusion on careful study of empirical data. U.S.S.G. Amendment 433; Report of Criminal History Working Group. In contrast, when the Commission concluded in 2004 that possession of a short-barreled shotgun should qualify, it referred to no empirical data or case analysis. U.S.S.G. Amendment 674.

B. Constitutionally Protected Values Are Violated By The Vagueness of the Residual Clause.

The lack of clarity inherent in the residual clause implicates all three of the constitutional values underpinning the void-for-vagueness doctrine: the right to fair notice; prevention of arbitrary enforcement; and protection of separation of powers.[6] The fact that it is a sentencing statute should not lessen the Court's concern with its vagueness.

1. The Residual Clause Deprives Citizens of Fair Notice.

The residual clause fails to provide the fair notice that due process requires. The government suggests that vagueness doctrine is only concerned with providing "innocent" citizens enough information about what conduct is unlawful to permit them to avoid it, and any lack of clarity in a sentencing provision does not raise constitutional alarms. (Govt. Supp. 18-19.) This Court has disagreed, applying vagueness analysis to sentencing provisions. *See, e.g., United States v. Batchelder*, 442 U.S. 114, 123 (1979); *United States v. Evans*, 333 U.S. 483 (1948). The residual clause's vagueness raises even greater constitutional concerns than the statutes those cases considered.

First, the residual clause does not merely direct judges regarding how to use their discretion within a

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6. The government fails to discuss separation of powers, probably because Congress has undeniably failed to answer this Court's repeated calls to revise the residual clause.

prescribed range of punishment. Instead it is part of a definition that triggers a severe mandatory penalty. Such mandatory sentencing laws raise serious constitutional concerns and require greater notice than non-mandatory provisions. This Court's ruling that the Sixth Amendment requires notice in an indictment of any fact that raises the maximum penalty or the mandatory minimum demonstrates the constitutional significance of such statutes. *See Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (noting the importance of learning the possible punishment from the indictment, a safeguard, in part, of fair notice); *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013) (same).

Likewise, the ex post facto clause is violated by a retroactive increase in criminal penalties, in part because fair notice is undermined when a newly available sentence is applied to a previously committed crime. *Peugh v. United States*, 133 S. Ct. 2072, 2082 (2013). "Because increasing the punishment affixed to the crime deprives people of the opportunity to plan their conduct in light of the law, '[t]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty; and therefore they may be classed together.'" *Id.* at 2095 (quoting *Calder v. Bull*, 3 U.S. 386, 397 (1798))(Thomas, J., dissenting). "Thus, almost from the outset, we have recognized that central to the ex post facto prohibition is a concern for the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Miller v. Florida*, 482 U.S. 423, 430 (1987) (internal quotation omitted).

Both the ex post facto clause's unquestioned application to sentencing provisions and the Sixth Amendment's relevance to mandatory penalties reinforce what this Court's vagueness jurisprudence already demonstrates: the Constitution requires citizens, whether "innocent" or "criminal" to have clear notice of what conduct the law forbids *and* of the consequences for committing the crime.

The residual clause's vagueness creates notice problems for more than just "prospective criminals." Even after indictment it can be impossible for courts and learned counsel to predict whether a defendant charged with violating 18 U.S.C. § 922(g) will face the ACCA's enhanced penalties when his prior convictions might or might not qualify as predicate offenses under the residual clause. Indeed, in many cases the governing circuit has not recently decided whether a particular state statute qualifies under the always-in-flux provision, and the parties can only guess whether a conviction will expose a defendant to no more than ten years in prison, or to no less than fifteen. If the attorneys guess wrong, the consequences are enormous. *See, e.g.*, *United States v. Miller*, 371 F. App'x 646 (6th Cir. 2010) (affirming ACCA sentence although the defendant was unaware of ACCA enhancement until after conviction at trial); *United States v. O'Neal*, 180 F.3d 115, 125-126 (4th Cir. 1999) (collecting cases holding that a defendant need only be advised about the ACCA enhancement before sentencing, not before trial). The guesswork and speculation caused by the vague residual clause plainly preclude the fair notice the Constitution requires.

2. The Residual Clause's Vagueness Permits Arbitrary Enforcement And Contradictory Outcomes.

Vagueness doctrine also serves to prevent arbitrary and discriminatory enforcement of laws. The government suggests that this concern is not implicated by the residual clause because it "applies at sentencing of its own force" and is administered by courts rather than prosecutors (Govt. Supp. 20), but this analysis is both untrue and unsupported by vagueness jurisprudence.

First, the fact that judges are the "deciders" in applying the ACCA does not diminish the constitutional problems created by the residual clause's vagueness. This Court has as often bemoaned the arbitrariness and lack of uniformity created by vague statutes when applied by judges as when invoked by police officers and prosecutors. *See, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (finding Florida vagrancy statute unconstitutionally vague in part due to the arbitrariness it permits by "police and the courts"); *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) (statute leaves "judges and jurors" too much discretion), *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (analyzing whether deportation statute was vague even though immigration judges rather than police apply it). And de novo appellate review has done little to alleviate widespread disparity in the law's application.

Second, the government plays a significant role in the operation of the residual clause, which is almost always triggered because prosecutors argue at sentencing that a particular predicate offense qualifies under its language. The government also bears the evidentiary burden to

support the ACCA. *See United States v. Barbour*, 750 F.3d 535, 542 (6th Cir. 2014) (noting that burden to establish violent felony status of a prior conviction rests with the government); (Govt. Supp. 43.) The residual clause provides few limitations on the exercise of this prosecutorial power: any state statute that has not recently been specifically ruled upon by this Court or the appellate court can be urged as a basis for the enhancement.

In sum, the residual clause violates due process by depriving citizens of notice of the penalties for violating the law, by permitting arbitrary enforcement, and by violating the essential separation of powers inherent in the Constitution. Regardless of its status as a sentencing provision, this Court should declare it unconstitutionally vague.

II. SIMILAR LANGUAGE IN OTHER STATUTES HAS NO BEARING ON THE VAGUENESS OF THE RESIDUAL CLAUSE.

The residual clause is vague because its text and structure are unclear, because this Court's efforts to create a consistent interpretive framework have been unsuccessful, and because lower courts are unable to apply it consistently to a wide variety of state-court offenses. The government refers the Court to one hundred pages of statutes which it claims are so similar to the residual clause that it cannot be vague. The comparison does not hold up to scrutiny.

First, the overwhelming majority of laws cited by the government are so different in language and operation from the residual clause that they have no bearing on the

Court's decision in this case. The simple fact that other statutes include the words "serious risk" does not make them relevant.

It almost goes without saying that the same words, even "identical language," can have different meanings in different statutes. *See Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (Ginsburg, J., plurality opinion); *id.* at 1092 (Kagan, J., dissenting) (agreeing with the plurality that "context matters in interpreting statutes"). In the specific arena of vagueness, both the statutory context surrounding challenged language and clarifying judicial interpretations can insure that a statute with imperfect text is nonetheless constitutional. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (finding that statute is not vague in part because it is not a general "breach of peace" ordinance, but is narrowly tailored to schools); *Skilling v. United States*, 561 U.S. 358, 409 n. 43 (2010) (finding that a vague statute may be saved by a "reasonable narrowing interpretation"). The context alone prevents almost every one of the identified statutes from being vulnerable to a vagueness challenge, unlike the residual clause.

A quick examination of several statutes found in the government's appendix demonstrates the differences. D.C. Code § 22-404.03(a)(2) uses the term "creates a grave risk of serious bodily injury" in a narrowly crafted statute criminalizing assault on a public vehicle inspector. (App'x 24a.) Not only is the risk language part of an element that must be committed by the defendant, but the risk must result from specific actions (i.e., assaulting, impeding, intimidating) and actual "serious bodily injury" must occur. In addition, the statute requires the defendant to act

"under circumstances manifesting extreme indifference to human life." Every aspect of this statute is more precise than the residual clause, and therefore it is not unconstitutionally vague.

Similarly, N.Y. Penal Law § 156.26 (App'x 60a-61a), which criminalizes computer tampering, requires a showing of actual "serious physical injury," ties it to very specific acts of the defendant, and requires the defendant to be "aware of and consciously disregard[]" the risk. Likewise, Cal. Penal Code § 11417(b) (App'x 18a) could not be more different from the vague residual clause. It criminalizes "intentional release of a dangerous chemical" with the specific intent to "cause harm" as an element.

Indeed, even the state statutes which operate somewhat like the residual clause, *e.g.* Ohio Rev. Code Ann. § 2901.01(A)(9)(c) (App'x 65a), do so with far greater clarity. The Ohio definition of "offense of violence" requires the offense to be "committed purposely or knowingly" and to involve either actual harm or a risk of "serious physical harm," a greater degree of harm than the residual clause. Likewise, although the Louisiana recidivism statute cited by the government (App'x 34a), uses language similar to the residual clause to define crime of violence, it does what the ACCA fails to, by including a specific list of 46 offenses which qualify.[7] Moreover, the definition requires that the offense has *as an element* the use of force.

Two statutes referenced by the government, 18 U.S.C. § 16 and § 924(c) (App'x 1a), are admittedly more comparable to the residual clause. However, they have

7. La. Rev. Stat. Ann. § 14:2(B) (Supp. 2015).

different language (discussing the risk of use of force rather than the risk of injury) and both statutes operate in ways that reduce their potential vagueness. For instance, the Court has construed § 16(b)'s crime of violence definition to include an offense only when (1) it naturally involves a disregard of the substantial risk that physical force may be used; (2) the risk arises while committing the offense; and (3) it is a "violent, active" offense. *Leocal v. Ashcroft*, 543 U.S. 1, 10-11 (2004); *United States v. Serafin*, 562 F.3d 1105, 1108 (10th Cir. 2009). These requirements are meaningfully different than the ACCA's residual clause and make § 16(b) narrower. *Leocal*, 543 U.S. at 10 & n. 7. Moreover, § 16(b)'s risk "must arise in the course of committing the crime and not merely as a possible result." *Serafin*, 562 F.3d at 1109.

Section 924(c) is likewise very different from the residual clause. The language of § 924(c)(3)(b) is materially identical to § 16(b), so the above analysis applies with equal force. Even more critically, § 924(c) defines a separate crime and uses the phrase "crime of violence" as an element, not merely as a way to categorize previous offenses. To be found guilty, the defendant must commit a crime of violence *and* must use or carry a firearm while doing so, or must possess a firearm in furtherance of the crime. The requirement that the firearm be intrinsically related to the crime of violence necessarily narrows its application.

In sum, a cursory review demonstrates that few of the statutes listed in the appendix are even textually similar to the residual clause, let alone similar in context and application. And the government has not demonstrated that *any* of the statutes suffer from the other infirmities

of the residual clause: an inability of the highest Court to craft a coherent interpretive framework, combined with turmoil among lower courts. In terms of fatally defective vagueness, the residual clause stands alone.

III. STARE DECISIS DOES NOT CONTROL THE COURT'S DECISION.

Although the doctrine of stare decisis is important, it does not tie the Court's hands in this case. Stare decisis has been recognized as "a principle of policy and not a mechanical formula." *See, e.g., Patterson v. McLean Credit Union*, 485 U.S. 617, 618-19 (1988) (listing a "host of cases" in which the Court has overruled previous "statutory precedents"). It is "not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).[8]

For several reasons, stare decisis does not prevent the Court from holding the residual clause to be unconstitutionally vague, despite the Court's exploration of the vagueness issue in *James v. United States*, 550 U.S. 192, 210 n. 6 (2007), and *Sykes*, 131 S. Ct. at 2277. First, the doctrine has much less force in a case, such as this, where the precedent at issue has proven unworkable, where "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). "When a decision has been questioned by Members of the Court in later decisions, and has defied consistent application by lower courts, these factors weigh in favor

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8. It is ironic that the government relies so heavily upon the doctrine of stare decisis while at the same time repeatedly advocating an interpretation of this Court's decision from *Sykes* that would all but overrule the Court's holding in *Begay*.

of reconsideration." *Id.* at 235 (quotations omitted); *see also Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). The residual clause has resisted consistent application, and has been the subject of criticism by Members of this Court and myriad lower courts. It has been proven unworkable.

Moreover, the doctrine of stare decisis exerts less control where, as here, the challenged precedent is recent and the reliance interests at stake are minimal. In less than a decade the Court has battled the residual clause five times: the first precedent declining the invitation from three Members to declare it unconstitutionally vague was only eight years ago. In *Montejo*, 556 U.S. at 792-93, this Court rejected an argument that stare decisis prevented it from overruling precedent, noting that the rule in question was "only two decades old." *See also Pearson*, 555 U.S. at 233 (overruling an eight-year-old decision).

Likewise, the reliance interests here are slight. *See Alleyne v. United States*, 133 S. Ct. 2151, 2164 (2013) (Sotomayor, J., concurring) (describing reliance interests as minimal even where decision would make sentences based upon mandatory minimums vulnerable to challenge). It appears that on average between five and six hundred defendants are sentenced under the onerous provisions of the ACCA each year, although it is unknown how many of those massive sentences depend upon the residual clause for effect.[9] In each residual clause case,

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9. Even if the Court rules the residual clause unconstitutionally vague, "serious drug offenses," enumerated offenses, and offenses that contain an element related to force will all remain lawful ACCA predicates. Under each definition, the *elements* of the underlying offense, rather than speculation about what it might entail under imagined circumstances, determine whether it

even if the Court's determination of vagueness is given retroactive effect, the defendants' convictions will not be vacated, nor will they go unpunished. Instead those defendants will remain convicted of violating 18 U.S.C. § 922(g) and will be resentenced, likely to significant prison terms of up to ten years. Moreover, the government does not substantiate its assertion that "many" charging decisions (allowing a plea to the "lesser" ACCA charge) have been made in reliance on the Court's decision not to declare the statute unconstitutionally vague. Indeed, the more common reality is that defendants are charged only with being felons in possession of a firearm, and not with greater offenses. And the reliance of courts and parties on the Court's rejection of the vagueness challenge in *James* and *Sykes* has been limited because in neither case was the issue briefed or argued by the parties. Instead, it was raised by Members of the Court and dismissed by the majority without extensive exploration of its merits.

Finally, while stare decisis may deserve greater weight in questions of statutory interpretation, where "Congress remains free to alter what [the Court] has done," *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989), that rationale actually supports Mr. Johnson's position regarding vagueness. Here, Congress has been free to fix the residual clause; indeed it has been repeatedly asked to do so by this Court and has done nothing. This silence in the face of clear need for revision is a unique reason that this Court's earlier discussions do not control the day on the issue of vagueness.

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triggers the ACCA. This clear textual, elements-focused analysis protects these provisions from vagueness, unlike the residual clause.

Stare decisis is not sacrosanct, but rather a "principle of policy," and "[w]hen considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions decided against the importance of having them decided right." *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). Mr. Johnson respectfully urges that this balancing supports both overruling the Court's conclusion that the residual clause is amenable to clear interpretation and consistent application, and declaring it unconstitutionally vague.

IV. WHAT IS THE PROPER REMEDY FOR THE VAGUENESS OF THE RESIDUAL CLAUSE?

Although the Court should not lightly declare a statute unconstitutionally vague, this case presents a unique set of circumstances that strongly support applying the doctrine.

A. Facial Invalidation of the Residual Clause Is Justified.

The residual clause's vagueness is glaring and unique, justifying a declaration that it is facially unconstitutional. The government's efforts to resist such a conclusion must be rejected.

First, it is an overstatement that a statute can only be declared unconstitutionally vague if the Court finds it to be vague in every imagined application. (Govt. Supp. 15-16.) This absolutist articulation of the standard for finding facial vagueness is not scrupulously followed in practice. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 64 (1999)

(finding a statute facially vague without determining that it is vague in every application); *United States v. Jones*, 689 F.3d 696, 703 (7th Cir. 2012) (noting that the Supreme Court "regularly decides due-process vagueness claims without regard to the facts of the case," and identifying six examples); Pet. Supp. 54-56. Moreover, the important concerns of separation of powers that partially motivate such a rule are simply inapplicable here. Congress has not only been given ample opportunity to correct the statute's flaws, but has been repeatedly beseeched to do so and has not.

Second, the text, interpretation and application of the residual clause stand out among previous statutes explored by this Court for vagueness. Although facial invalidation of a vague statute is an infrequent remedy, the situation before the Court justifies use of that remedy. No other statute of which Mr. Johnson is aware, let alone a mere segment of a subdivision of a statute, has received as frequent attention from this Court in as short a period of time, with almost every decision marked by disagreement. Likewise, Mr. Johnson is unaware of any statute previously considered under this Court's vagueness doctrine that has given rise to so many expressions of frustration and confusion from lower courts, and to so many different and evolving circuit splits.[10]

Third, a facial declaration — or at least an as-applied declaration with strong language — serves the interests

10. In *Jordan v. DeGeorge*, in contrast to the cacophony of judicial frustration regarding the residual clause, the Court rejected a vagueness challenge, noting that it could not "find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process." 341 U.S. at 230.

of judicial economy and separation of powers here in a way that it may not in other cases. If the Court decides that the residual clause is unconstitutionally vague only as to possession of a short-barreled shotgun then, instead of facing a long queue of circuit disagreements about whether given offenses fall within the residual clause as it does today, it will substitute a queue of as-applied vagueness claims. A clear facial decision will avoid such an outcome and will put the onus for fixing the statute where it belongs: on Congress.[11] And because the clause is so unique in text, operation, and jurisprudential history, the Court can narrowly tailor its holding to invalidate only this provision and no others.

B. Samuel Johnson's ACCA Sentence Must Be Vacated.

At a minimum the Court should vacate Samuel Johnson's fifteen-year sentence. Whether the Court accomplishes this by ruling the residual clause unconstitutionally vague facially or as-applied, through operation of the rule of lenity, or simply by deciding that the clause's definition does not cover mere possession of a short-barreled shotgun, the result must be remand for a new sentence of no more than ten years in prison.

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11. The government criticizes Mr. Johnson for not endeavoring to rewrite the residual clause in a way that will correct its vagueness. (Govt. Supp. 33) Defining crimes and setting their possible punishments is within the unique purview of Congress. *See United States v. Evans*, 333 U.S. 483, 495 (1948). Although alternative formulations, such as utilizing an elements-based approach or expanding the list of enumerated offenses, can be readily imagined, Congress is far better positioned to craft criminal legislation than a defendant or his counsel.

The government concedes that in cases where a "grievous ambiguity or uncertainty about [the residual clause's] application to a particular offense" exists, the dispute should be resolved in favor of the defendant through operation of the rule of lenity. (Govt. Supp. 17.) The government also concedes that in cases where a court cannot decide what sort of conduct represents the ordinary case (Govt. Supp. 41), or where a court is left uncertain about the degree of risk posed by a particular offense, the "defendant must prevail." (Govt. Supp. 43.) Each of these concessions applies to Mr. Johnson's case. There is nothing in the residual clause's text, its legislative history, or this Court's jurisprudence that plainly supports its application to mere possession of a short-barreled shotgun; indeed, the opposite is true. The government is unable to support its assertion that the ordinary case of this mere possession offense is possession during a serious crime by a violent criminal. And the government has failed to carry *its* burden of proving that this offense entails the requisite risk. In light of the government's own concessions, Mr. Johnson must win.

CONCLUSION

In sum, the Court should use its power to hold the residual clause of the ACCA unconstitutionally vague. The unclear language of the provision combined with this Court's unsuccessful efforts to create an interpretive framework, and the frustration and disagreement among the lower courts all strongly support such a finding.

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SUPPLEMENTAL BRIEF

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In the Supreme Court of the United States

SAMUEL JAMES JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the residual clause in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague.

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p. 27,252 4
p. 29,649 4
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In the Supreme Court of the United States

No. 13-7120

SAMUEL JAMES JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person * * * shall be * * * be deprived of life, liberty, or property, without due process of law.

The pertinent statutory and regulatory provisions are set forth in the appendix to the United States' opening brief. U.S. Br. App. 2a-32a.

STATEMENT

1. In 1984, Congress enacted the Armed Career Criminal Act (ACCA). See Pub. L. No. 98-473, 98 Stat. 2185. The statute provided at that time that a person who "receives, possesses, or transports" a firearm in commerce and who had three or more con-

victions for "robbery or burglary" in federal or state courts would be subject to a mandatory sentence of at least 15 years. 18 U.S.C. App. 1202(a) (Supp. II 1984). Robbery and burglary were defined as offenses containing particular elements. 18 U.S.C. App. 1202(c)(8) and (9) (Supp. II 1984).

In 1986, Congress amended the ACCA twice. In May, Congress recodified the ACCA at its current location of 18 U.S.C. 924(e). See Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 458-459. It also changed the triggering offense to a violation of 18 U.S.C. 922(g), which makes it unlawful for certain individuals, including felons, to ship, transport, possess, or receive any firearm or ammunition with a specified connection to interstate commerce. Absent the ACCA enhancement, Section 922(g) imposes a penalty of up to ten years of imprisonment. 18 U.S.C. 924(a)(2).

In October 1986, Congress enacted the Career Criminals Amendment Act as a subtitle of the Anti-Drug Abuse Act of 1986. See Pub. L. No. 99-570, § 1402, 100 Stat. 3207-39. That statute substantially expanded the range of ACCA predicate offenses. Rather than limiting the ACCA to specifically defined generic crimes, the amendments made any "violent felony" or "serious drug offense" an ACCA predicate, and it defined those terms broadly to capture a range of federal and state crimes. The term "serious drug offense" was defined to include both specified violations of federal drug laws and "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" for which a maximum sentence

of ten years or more is prescribed by state law. 18 U.S.C. 924(e)(2)(A).

Similarly, a "violent felony" was defined to capture an array of federal and state offenses:

> any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). Subsection (i) of that definition has been called the "elements clause" because it encompasses crimes that include one of the three specified elements. The first nine words of Subsection (ii) has been called the "enumerated-crimes clause" because it lists four generic crimes that correspond to various federal and state offenses. This Court has referred to the second part of Subsection (ii) as the "residual clause."

The October 1986 amendments reflected Congress's view that, as enacted in 1984, the ACCA did not identify all individuals who are properly characterized as "career criminals" and who thus should face heightened penalties for illegal firearm possession. See *Taylor* v. *United States*, 495 U.S. 575, 583-584 (1990). As particularly relevant here, what has come to be known as the residual clause was, along with the elements clause, the principal solution that Congress devised to address that problem. As originally passed out of the Subcommittee on Crime of the House Judi-

ciary Committee, the bill's definition of "violent felony" included only an elements clause and a standalone "residual" clause: "any crime punishable by imprisonment for a term exceeding one year that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) involves conduct that presents a serious potential risk of physical injury to another." H.R. 4885, 99th Cong., 2d Sess. 3 (1986); see *Taylor*, 495 U.S. at 586. The Committee's report indicated that the second clause would include "burglary, arson, extortion, use of explosives and similar crimes." H.R. Rep. No. 849, 99th Cong., 2d Sess. 5-6 (1986).

The text from that bill was folded into the House bill that became the Anti-Drug Abuse Act of 1986. See H.R. 5484, 99th Cong., 2d Sess. 203-205 (introduced Sept. 8, 1986). After the House sent that bill to the Senate, the Senate passed an amended bill that included a different formulation of a standalone residual clause, which encompassed crimes posing a risk either to persons or property ("by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), mirroring the Criminal Code's general definition of "crime of violence," 18 U.S.C. 16(b) (Supp. II 1984). See 132 Cong. Rec. 27,206, 27,252 (Sept. 30, 1986); cf. *Leocal* v. *Ashcroft*, 543 U.S. 1, 6-12 (2004) (construing 18 U.S.C. 16(b)). The conference then added the enumerated-crimes clause to the House version of the residual clause. See 132 Cong. Rec. 29,649 (Oct. 8, 1986). That addition clarified that certain property crimes like burglary and arson—which would unequivocally have been included in the Senate version of Subsection (ii)—

would also be included in the House's version, despite that version's exclusive focus on risk to persons.

In 1988, Congress amended the ACCA to include certain acts of juvenile delinquency as predicate offenses and to provide that prior offenses must have been committed on different occasions to count as separate predicate offenses. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6451, 7056, 102 Stat. 4371, 4402. Since 1988, Congress has made only minor or technical changes to the ACCA.[1]

2. In the 28 years since Congress expanded the ACCA, this Court has decided four cases involving the residual clause, in addition to ten cases involving other applications of the statute.[2]

In *James* v. *United States*, 550 U.S. 192 (2007), this Court set out the general framework for determining whether a particular offense falls within the residual clause and concluded that attempted burglary under Florida law qualifies. First, the Court held, under the "categorical approach" that this Court has employed for statutes that focus on "convictions" rather than conduct, a court must identify the conduct encompassed by the elements of the offense. *Id.* at 201-202.

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[1] See Crime Control Act of 1990, Pub. L. No. 101-647, § 3529(2) and (3), 104 Stat. 4924; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 110510(a), 330003(f)(2), 108 Stat. 2018, 2141; Criminal Law Technical Amendments Act of 2002, Pub. L. No. 107-273, § 4002(d)(1)(E), 116 Stat. 1809.

[2] See *Descamps* v. *United States*, 133 S. Ct. 2276 (2013); *McNeill* v. *United States*, 131 S. Ct. 2218 (2011); *Johnson* v. *United States*, 559 U.S. 133 (2010); *United States* v. *Rodriquez*, 553 U.S. 377 (2008); *Logan* v. *United States*, 552 U.S. 23 (2007); *Shepard* v. *United States*, 544 U.S. 13 (2005); *Daniels* v. *United States*, 532 U.S. 374 (2001); *Caron* v. *United States*, 524 U.S. 308 (1998); *Custis* v. *United States*, 511 U.S. 485 (1994); *Taylor*, *supra*.

Second, a court must ask "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Id.* at 208-209. The Court explained that the "ordinary case" focus was necessary given that "even a prototypically violent crime might not present a genuine risk of injury" on a particular occasion—for example, extortion conducted by an "anonymous blackmailer." *Id.* at 208. The Court found that attempted burglary presents the requisite risk because it poses at least as much risk as completed burglary. See *id.* at 203-209. The Court did not decide whether offenses less risky than any of the enumerated offenses could also qualify under the residual clause.

James rejected a "suggestion" by Justice Scalia in dissent that under the Court's interpretation, "the residual provision is unconstitutionally vague." 550 U.S. at 210 n.6. The Court held that the clause "is not so indefinite as to prevent an ordinary person from understanding what conduct it prohibits," citing other federal and state laws using similar risk-based formulations. *Ibid.* Justice Scalia, joined by two other Justices, argued in favor of a limiting construction that he believed would avoid vagueness concerns: that a residual-clause predicate offense must pose at least as much risk as the least risky enumerated crime (in his view, burglary). See *id.* at 219 (Scalia, J., dissenting). Unlike the majority, he concluded that attempted burglary is categorically less risky than burglary. *Id.* at 225-227 (Scalia, J., dissenting).

In two of the three residual-clause cases it has decided since *James*, the Court applied the same analysis: It asked whether the conduct encompassed by the elements of the offense, in the main, presented a seri-

ous risk of physical injury to other people. In *Chambers* v. *United States*, 555 U.S. 122 (2009), the Court, relying in part on the conclusions of the Sentencing Commission, held that the Illinois offense of failure to report to prison does not pose a sufficiently serious risk. See *id.* at 128-130. And in its most recent decision, *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), the Court, after examining available empirical evidence and comparing the risk posed by the offense to the risk presented by the enumerated offenses, held that the Indiana offense of intentional vehicular flight from a law-enforcement officer qualifies as an ACCA predicate. *Id.* at 2271.

The Court conducted a different analysis in *Begay* v. *United States*, 553 U.S. 137 (2008), which held that felony drunk driving under New Mexico law does not fall within the residual clause. See *id.* at 148. The Court assumed that the crime was sufficiently risky, but held that it was too different in kind from the enumerated crimes to qualify because it does not involve "purposeful, violent, and aggressive conduct." *Id.* at 145. In its later decision in *Sykes*, however, the Court clarified that *Begay*'s requirement that a crime be "'purposeful, violent, and aggressive,'" was used only to "explain the result" in a case that "involved a crime akin to strict liability, negligence, and recklessness crimes." 131 S. Ct. at 2275-2276. The Court stated that outside of that class of offenses, "risk levels provide a categorical and manageable standard" for courts to apply. *Ibid.*

Justice Scalia dissented in *Sykes*, arguing that the residual clause "is a drafting failure" that is "void for vagueness." 131 S. Ct. at 2284. The majority rejected that argument, reaffirming its holding in *James*.

"Congress," the Court explained, "chose to frame ACCA in general and qualitative, rather than encyclopedic, terms" by "stat[ing] a normative principle." *Id.* at 2277. The Court again concluded that the statute "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law.'" *Ibid.* (quoting *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999) (opinion of Stevens, J.)). "Although this approach may at times be more difficult for courts to implement," the Court held, citing similarly phrased federal statutes, "it is within congressional power to enact." *Ibid.*

3. In the period since the ACCA's residual clause was enacted in 1986, lower courts have held that a range of dangerous offenses fall within its compass. Those offenses include:

- child abuse, *United States* v. *Wilson*, 568 F.3d 670, 672-674 (8th Cir. 2009);
- enticing and inviting a child into a house to commit sodomy, *United States* v. *Williams*, 120 F.3d 575, 578-579 (5th Cir. 1997), cert. denied, 522 U.S. 1061 (1998);
- larceny from a person, *e.g.*, *United States* v. *Howze*, 343 F.3d 919, 922-924 (7th Cir. 2003);
- attempted rape, *e.g.*, *Dawson* v. *United States*, 702 F.3d 347, 351-352 (6th Cir. 2012);
- sexual assault, *e.g.*, *United States* v. *Terrell*, 593 F.3d 1084, 1089-1091 (9th Cir. 2010), cert. denied, 131 S. Ct. 2094 (2011);
- attempted kidnapping, *e.g.*, *United States* v. *Kaplansky*, 42 F.3d 320, 323-324 (6th Cir. 1994) (en banc);

- compelling a person to act as a prostitute, *United States* v. *Brown*, 273 F.3d 747, 749-751 (7th Cir. 2001);
- false imprisonment, *e.g.*, *United States* v. *Schneider*, 681 F.3d 1273, 1280-1282 (11th Cir. 2012);
- solicitation to commit aggravated assault, *United States* v. *Benton*, 639 F.3d 723, 731-732 (6th Cir.), cert. denied, 132 S. Ct. 599 (2011);
- assault with intent to commit murder, *United States* v. *Jones*, 673 F.3d 497, 505-508 (6th Cir.), cert. denied, 133 S. Ct. 350 (2012);
- stalking involving constraining or restraining the victim, *e.g.*, *United States* v. *Meherg*, 714 F.3d 457, 461 (7th Cir.), cert. denied, 134 S. Ct. 256 (2013);
- resisting arrest, *United States* v. *Weekes*, 611 F.3d 68, 72-73 (1st Cir. 2010) (Souter, J.), cert. denied, 131 S. Ct. 3021 (2011);
- attempted arson, *United States* v. *Rainey*, 362 F.3d 733, 735-736 (11th Cir.) (per curiam), cert. denied, 541 U.S. 1081 (2004);
- malicious discharge of a firearm at an occupied dwelling or vehicle, *United States* v. *Ford*, 613 F.3d 1263, 1270-1273 (10th Cir. 2010);
- rioting at a correctional institution, *United States* v. *Johnson*, 616 F.3d 85, 87-94 (2d Cir. 2010), cert. denied, 131 S. Ct. 2858 (2011);
- possession of a loaded weapon with intent to use it unlawfully against another person, *e.g.*, *United States* v. *Lynch*, 518 F.3d 164, 172-173 (2d Cir. 2008), cert. denied, 555 U.S. 1177 (2009); and
- possession of a weapon in a prison, *e.g.*, *United States* v. *Boyce*, 633 F.3d 708, 711-712 (8th Cir. 2011), cert. denied, 132 S. Ct. 1002 (2012).

4. As required by statute, the United States Sentencing Guidelines have always included a "career offender" guideline, § 4B1.1; see 28 U.S.C. 994(h). That guideline imposes greater penalties on adult defendants for a third felony conviction for a "crime of violence" or "controlled substance offense." As originally promulgated, "crime of violence" was defined using the Criminal Code's general definition of that term at 18 U.S.C. 16. See Sentencing Guidelines § 4B1.2 (1987). In 1989, the Sentencing Commission amended the definition to generally track the ACCA, except that instead of "burglary," the enumerated-crimes clause says "burglary of a dwelling." See Sentencing Guidelines Manual App. C, Amend. 268 (effective Nov. 1, 1989).

The commentary to Section 4B1.2 sets forth crimes that the Commission has determined to meet the standards for a "crime of violence" or a "controlled substances offense." For example, the commentary states that the basic felon-in-possession offense does not qualify, but that possession of a weapon regulated by the National Firearms Act, see 26 U.S.C. 5845(a), such as a "sawed-off shotgun or sawed-off rifle, silencer, bomb, or machinegun," does qualify. § 4B1.2, comment. (n.1).

5. Petitioner pleaded guilty in the United States District Court for the District of Minnesota to one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2-A3. The district court concluded that petitioner had three prior convictions that qualified as violent felonies under the ACCA. One of petitioner's predicate offenses was a Minnesota conviction for unlawful possession of a short-barreled shotgun, which the court

held to fall within the residual clause. *Id.* at A3-A4. The court therefore sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. *Id.* at B2-B3. The court of appeals affirmed. *Id.* at A1-A7. In both the district court and the court of appeals, petitioner preserved an argument that the residual clause of the ACCA is unconstitutionally vague, although he did not seek certiorari on that question. See Pet. Supp. Br. 2.

SUMMARY OF ARGUMENT

This Court correctly held in *James* v. *United States*, 550 U.S. 192 (2007), and *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), that the ACCA's residual clause is not unconstitutionally vague.

A. Because the ACCA is a sentencing statute that does not regulate constitutionally protected activity, the standard for holding it unconstitutionally vague is exceptionally demanding. To be invalidated, the residual clause must be "impermissibly vague in all of its applications," *Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1982), even for the myriad offenses that uncontroversially involve substantial risks of physical injury, see, *e.g.*, pp. 8-9, *supra*. And as a provision that prescribes only the sentencing range for clearly illegal conduct, the ACCA implicates neither of the vagueness doctrine's core concerns: advising law-abiding citizens about what conduct is criminal and preventing arbitrary or discriminatory enforcement by law-enforcement officers, prosecutors, and juries. *Skilling* v. *United States*, 561 U.S. 358, 402-403 (2010).

B. *James* and *Sykes* correctly held that the text of the residual clause states a sufficiently clear sentencing principle. The key phrase—"serious potential risk

of physical injury to another"—mirrors the language in over two hundred federal and state criminal statutes. And the distinguishing features of the residual clause make the statute's enforcement more uniform and predictable than the typical risk-based criminal statute, under which liability depends entirely on a factfinder's later case-specific determination of whether particular conduct posed a sufficiently substantial risk. Petitioner, moreover, has failed to identify any practicable alternative formulation that would eliminate the asserted vagueness problems while achieving the same congressional purpose of keeping firearms out of the hands of individuals who have repeatedly committed crimes that put other people in harm's way.

C. This Court's decisions interpreting the residual clause enable its principled application. Those decisions require a court to determine whether, in the ordinary case, the commission of the offense entails a serious risk of physical injury to other people. In identifying the ordinary case and determining whether it poses the requisite risk, federal judges can draw on their vast body of experience adjudicating criminal convictions and can test their judgments against reported case law, legislative findings, the views of the Sentencing Commission, and available empirical data. And although this Court has been called upon to resolve circuit conflicts over classes of offenses that present hard questions, this Court's docket can produce a skewed impression of the difficulty of applying the residual clause in the run of cases. Many offenses have not given rise to circuit conflicts because "the severity of the risk [is] obvious," *Begay* v. *United States*, 553 U.S. 137, 154 (2008) (Scalia, J., concurring in the judgment).

D. *Stare decisis* considerations militate strongly against invalidating the residual clause. Federal prosecutors have made numerous charging decisions in light of this Court's holding in *James* in 2007 that the residual clause is not unconstitutionally vague. And it would reduce confidence in the integrity of the judicial process for this Court now to declare the residual clause—a statute that it has itself interpreted and applied on four occasions—to be hopelessly indeterminate.

E. The residual clause is not vague as applied to petitioner. Under an analysis focused on risk levels and the nature of the offense, the illegal possession of a short-barreled shotgun—a weapon that in the ordinary case is unlawfully acquired to intimidate, maim, and kill human beings—clearly qualifies as an ACCA predicate.

ARGUMENT

THE RESIDUAL CLAUSE OF THE ACCA IS NOT UNCONSTITUTIONALLY VAGUE

The ACCA's residual clause classifies as a predicate offense any federal or state offense punishable by more than one year in prison that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). Courts must conduct a two-step analysis to decide whether a prior conviction satisfies the residual clause. First, a court must identify the conduct encompassed by the elements of the offense generally, without regard to the particular facts underlying the defendant's conviction. See *Sykes* v. *United States*, 131 S. Ct. 2267, 2272 (2011). Second, a court must determine whether that conduct, "in the ordinary case, presents a serious

potential risk of physical injury to another." *James* v. *United States*, 550 U.S. 192, 208 (2007). In making that risk assessment, a court must rely principally on its own "commonsense conclusion" about whether in the ordinary case the offense poses a serious risk of physical injury—for example, because in the course of committing the offense an individual risks provoking a violent confrontation with another person. *Sykes*, 131 S. Ct. at 2274. That judgment, informed by the federal bench's deep experience adjudicating criminal cases, can be tested against reported case law, legislative findings, the views of the Sentencing Commission, and any available empirical data. In the typical case involving a crime with a scienter element, and not a crime based on strict liability, negligence, or recklessness, that risk assessment completes the analysis under the ACCA. *Id.* at 2275-2276. As so interpreted by the Court, the residual clause is not unconstitutionally vague.

A. The Standard For Declaring The Residual Clause Void For Vagueness Is Exceptionally Demanding

The Due Process Clause bars enforcement of a criminal statute on vagueness grounds only if the statute "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U.S. 285, 304 (2008); see *Skilling* v. *United States*, 561 U.S. 358, 402-403 (2010). A statute is not void for vagueness because its applicability is unclear at the margins, *Williams*, 553 U.S. at 306, or, contrary to petitioner's view (Supp. Br. 56), because reasonable jurists might disagree on where to draw the line be-

tween lawful and unlawful conduct in particular circumstances, *Skilling*, 561 U.S. at 403.

Rather, the Court has struck down a criminal provision as void for vagueness only when it is so indeterminate as to have no "ascertainable standard." *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). The Court found that test met in a law forbidding "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," 41 Stat. 297, noting that it left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." 255 U.S. at 89. Similarly, the Court has "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306 (citing *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971), and *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 870-871 & n.35 (1997)). But a statute is not void for vagueness merely because "it may be difficult in some cases to determine whether [its] clear requirements have been met," *ibid.*, or because it produces close legal questions. After all, "[c]lose cases can be imagined under virtually any statute," and this Court regularly resolves circuit conflicts over the meaning of criminal statutes. *Ibid.*

Two additional principles are particularly relevant to the residual clause's constitutionality.

First, a statute that does not regulate constitutionally protected conduct may be declared "facial[ly]" void for vagueness "only if the enactment is impermissibly vague in all of its applications." *Hoffman Es-*

tates v. *Flipside, Hoffman Estates*, 455 U.S. 489, 494-495 (1982); see *id.* at 497; see also *Williams*, 553 U.S. at 306; *Chapman* v. *United States*, 500 U.S. 453, 467 (1991); cf. *Kolender* v. *Lawson*, 461 U.S. 352, 358 & n.8 (1983) (facially invalidating statute implicating "First Amendment liberties" and "constitutional right to freedom of movement") (internal quotation marks and citation omitted)). Accordingly, to establish that the residual clause is void for vagueness, petitioner must demonstrate that it could not intelligibly be construed to apply to *any* offenses, *i.e.*, that no offense could be deemed to involve a "serious potential risk of physical injury to another" with sufficient clarity. See *Hoffman Estates*, 455 U.S. at 497.

The Court could not reach that conclusion without overruling the statutory holdings of *James* and *Sykes*—and repudiating the views of even the two dissenting Justices in *Sykes* who believed that the statute clearly encompasses certain vehicular-flight offenses. See 131 S. Ct. at 2288 (Kagan, J., dissenting); see also *id.* at 2277 (Thomas, J., concurring in the judgment). Indeed, all four of this Court's residual-clause decisions presumably relied on the threshold determination that the statute's text is sufficiently clear to be interpreted. Particularly given that "*stare decisis* in respect to statutory interpretation has special force," *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (internal quotation marks omitted), holding the residual clause to be facially vague would, at minimum, require an extraordinary showing.

The burden on petitioner is even heavier in light of the range of state and federal crimes in which "the severity of the risk [is] obvious," such as "inciting to

riot[] and the production of chemical weapons." *Begay*, 553 U.S. at 154 (Scalia, J., concurring in the judgment) (citations omitted); see also pp. 8-9, *supra* (listing court of appeals decisions addressing various offenses). To declare the residual clause void, the Court would have to first conclude that not a single one of those offenses falls within the statute's compass with the requisite clarity.

Of course, a defendant may argue that a statute is vague as "applied to the facts of [his] case." *Chapman*, 500 U.S. at 467. But with a statute like the ACCA, which sets out a general standard that applies to a range of offenses, any "grievous ambiguity or uncertainty" about its application to a particular offense would simply be resolved in favor of the defendant under the rule of lenity, *Dean* v. *United States*, 556 U.S. 568, 577 (2009) (citation omitted), the "junior version of the vagueness doctrine," *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (citation omitted). See *Begay*, 553 U.S. at 148 (Scalia, J., concurring in the judgment); cf. p. 51, *infra*.

Second, although this Court has indicated that "vague sentencing provisions may pose constitutional questions," *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979), it has made clear that the standard to invalidate a sentencing provision as vague is, at minimum, much more demanding than the standard that applies to a statute defining criminal conduct (a principle that petitioner acknowledges, see Pet. Supp. Br. 41). See *Chapman*, 500 U.S. at 467-468 (finding vagueness claim "particularly" without merit, despite any plausible argument against the Court's statutory interpretation, "since whatever debate there is would center around the appropriate sentence and not the

criminality of the conduct"). Indeed, petitioner has not identified a single noncapital case in which this Court has held that a provision graduating the penalty for clearly illegal conduct is unconstitutionally vague. Petitioner relies (Supp. Br. 40, 46-47, 50) on *United States* v. *Evans*, 333 U.S. 483 (1948), but that decision held only that a statute that prescribed "no penalty" at all for an offense—and that entailed "very real doubt and ambiguity concerning the scope of the acts forbidden"—was impermissibly vague. *Id.* at 487-495. And the rare capital factors found vague under Eighth Amendment standards are far more amorphous and subjective than the risk-based language of the ACCA. Cf. *Maynard* v. *Cartwright*, 486 U.S. 356, 363, 364 (1988) (whether murder was "especially heinous, atrocious, or cruel").

Applying a higher standard for sentencing provisions follows from the basic underpinnings of the vagueness doctrine. Neither concern at the heart of the doctrine—providing fair notice about what conduct is criminal and preventing arbitrary or discriminatory enforcement—is implicated by a statute that prescribes the sentence for unequivocally criminal conduct, like possessing a firearm as a felon.

Consider fair notice. Because this Court "assume[s] that [a person] is free to steer between lawful and unlawful conduct," it has "insist[ed] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Hoffman Estates*, 455 U.S. at 498 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972)). But no such concern arises here. Petitioner does not claim (and could not possibly claim) that he was deprived of fair notice that his possession

of a firearm was illegal. Rather, petitioner contends that due process requires a statute to clearly "advise a *prospective criminal*" of the sentencing consequences of his unlawful designs. Pet. Supp. Br. 5 (emphasis added). To underscore the point, he posits a "realistic hypothetical example" involving an attorney who, over the course of eight years, regularly advises a three-time felon about what sentence he would receive for violating Section 922(g)(1). *Id.* at 42-44.

That conception of the fair-notice doctrine goes far beyond this Court's precedents. The doctrine is designed to prevent laws that "trap the *innocent*," *Grayned*, 408 U.S. at 108 (emphasis added), and to "enable the *ordinary citizen* to conform his or her conduct to the law," *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999) (opinion of Stevens, J.) (emphasis added). The Court has never suggested that it is designed to help felons run a cost-benefit analysis before they commit new crimes. To whatever extent notice concerns might be implicated by penalty provisions, the Court has made clear that due process does not guarantee a felon contemplating illegal conduct the ability to predict the penalty to be imposed on him, so long as "the conduct prohibited and the punishment authorized" is "clearly define[d]." *Batchelder*, 442 U.S. at 123.

The concern with discriminatory or arbitrary enforcement—"the more important aspect of the vagueness doctrine," *Kolender*, 461 U.S. at 358—is no more infringed by a sentencing statute like the residual clause. A vague criminal statute can be problematic because it "delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned*, 408 U.S. at 108-109.

But neither law-enforcement officers nor juries enforce the ACCA. And while a district judge must decide whether the ACCA applies to a given prior offense, the resolution of that issue is a question of law subject to de novo review by a court of appeals and this Court.

Thus, far from vesting "virtually complete discretion" in local decisionmakers, *Kolender*, 461 U.S. at 358, the ACCA comes into play only when a judge finds that its legal predicates are satisfied at sentencing. And rather than permitting sentencing decisions on an "*ad hoc* and subjective basis," de novo appellate review promotes the statute's consistent application across defendants with similar felonies on their records. Indeed, everyday sentencing decisions entail significantly more localized discretion, and hence variation and unpredictability, than enforcement of the ACCA. See *United States* v. *Booker*, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.").

Petitioner thus errs in contending that under the ACCA "no clear limitations are placed on prosecutors," that the residual clause produces "arbitrary and subjective decisions by courts," and that the absence of "assistance from juries" renders the clause somehow *more* susceptible to arbitrary enforcement. Pet. Supp. Br. 44-46. The ACCA applies at sentencing of its own force; it does not require a prosecutor to invoke it. Cf. 21 U.S.C. 851(a) (requiring the government to file a sentencing information for a recidivist enhancement in a drug case). Nor is it clear how jury determinations would produce more predictable or uniform decisions than courts addressing legal ques-

tions subject to appellate review. And, although courts of appeals may sometimes reach different conclusions on particular classes of offenses until this Court issues an authoritative resolution of the conflict, this Court has never suggested that circuit conflicts over the meaning of criminal statutes give rise to vagueness concerns. To the contrary, this Court has repeatedly explained that circuit disagreements do not even justify resort to the rule of lenity. See, *e.g.*, *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990).

Given these background principles, petitioner must, at minimum, make an extraordinary showing to invalidate the residual clause as impermissibly vague. He has not done so.

B. The Text Of The Residual Clause States A Sufficiently Clear Sentencing Principle

Congress enacted the ACCA's residual clause to achieve the important goal of keeping guns out of the hands of individuals who have demonstrated that they are willing to engage in illegal conduct that puts other people in harm's way. See *Begay*, 553 U.S. at 144-147. Given the wide state-by-state variation in crime definition, Congress chose to identify ACCA predicate offenses through a "normative principle": whether they pose "a serious potential risk of physical injury to another." *Sykes*, 131 S. Ct. at 2277. As this Court correctly held in *James* and *Sykes*, that text is not "irredeemably, unworkably opaque." Pet. Supp. Br. 6. To the contrary, it mirrors the language in numerous criminal statutes. And the aspects of the residual clause that differentiate it from those other laws serve only to sharpen the provision's focus.

1. Numerous statutes impose criminal consequences for conduct presenting a general level of risk

As petitioner acknowledges (Supp. Br. 9), close variants of the residual clause are ubiquitous in criminal statutes. Numerous laws hinge criminal liability or sentencing consequences on a "risk," "substantial risk," "grave risk," or "unreasonable risk" of physical injury to other people. This Court identified several such provisions in *James* and *Sykes* in the course of holding that the residual clause is not impermissibly vague. *James*, 550 U.S. at 210 n.6; *Sykes*, 131 S. Ct. at 2277; see 18 U.S.C. 1031(b)(2), 2118(e)(3), 2246(4), 2258B(b), 2332b(a)(1)(B), 3286(b); Ariz. Rev. Stat. Ann. § 13-2508(A)(2) (Supp. 2014); Cal. Health & Safety Code § 42400.3(b) (West 2014); N.Y. Penal Law Ann. § 490.47 (McKinney 2008).

There are many more. For example, the federal Criminal Code's general definition of "crime of violence" set forth at 18 U.S.C. 16 includes any felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 16(b). That defined term is used in numerous provisions of the Code and other federal laws, including the Immigration and Nationality Act, see 8 U.S.C. 1101(a)(43)(F); *Leocal* v. *Ashcroft*, 543 U.S. 1, 6-7 & n.4 (2004); see also, *e.g.*, 18 U.S.C. 25, 119, 842, 931, 1952, 1956; and the same formulation is used in the provision criminalizing the use, carrying, or possession of a firearm during a "crime of violence," 18 U.S.C. 924(c)(3)(B). Although Section 16 refers to the risk that *force* will be used rather than that *injury* will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like

the ACCA, Section 16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters. Cf. *Leocal*, 543 U.S. at 7 (using categorical approach to construe Section 16). Still other provisions of federal law use similar risk-based formulations. See 18 U.S.C. 1365(a), 1864(a)(3), 2258D(b)(2)(B). And the Sentencing Guidelines' career-offender provision incorporates the ACCA's residual clause verbatim. See p. 10, *supra*.

It is not just federal law—far from it. The appendix to this brief collects over two hundred state statutes that impose criminal liability for conduct that presents a "risk," "substantial risk," "grave risk," or "unreasonable risk" of injury to others. Thus, for example, a typical reckless-endangerment or criminal-recklessness offense is defined as "recklessly engag[ing] in conduct which creates a substantial risk of serious physical injury to another person." N.Y. Penal Law § 120.20 (McKinney 2009); see, *e.g.*, Ala. Code § 13A-6-24(a) (LexisNexis 2005); Alaska Stat. § 11.41.250(a) (2014); Ariz. Rev. Stat. Ann. § 13-1201(A) (2010); Ark. Code Ann. § 5-13-205(a)(1) (2013). Similarly, child-abuse offenses impose criminal liability for exposing a child to a given level of risk of physical harm. See, *e.g.*, N.C. Gen. Stat. § 14-318.2(a) (2013) ("substantial risk of physical injury"); Ohio Rev. Code Ann. § 2919.22(B) (LexisNexis 2014) (discipline that is "excessive under the circumstances and creates a substantial risk of serious physical harm"). And many other offenses in disparate areas of the criminal law—arson, theft, sexual assault, threats, resisting arrest, vehicular homicide, kidnapping—use

similar risk-based formulations to define the crime or aggravating elements. See, *e.g.*, Conn. Gen. Stat. Ann. § 53a-111(a) (West 2012); Ind. Code Ann. § 35-43-4-2(a) (LexisNexis Supp. 2014); Iowa Code Ann. § 709.3(1) (West Supp. 2014); Md. Code Ann., Crim. Law § 3-1001(c) (LexisNexis Supp. 2014); Mass. Ann. Laws ch. 265 § 13L (LexisNexis 2010); Utah Code Ann. § 76-5-301(1)(b) (LexisNexis 2012). A handful of state laws also use such formulations to identify crimes; a Massachusetts statute incorporates the ACCA's text almost verbatim. See La. Rev. Stat. Ann. § 14:2(B) (Supp. 2015); Mass. Ann. Laws ch. 269, § 10G(e), ch. 140, § 121 (LexisNexis 2007 & 2010); Nev. Rev. Stat. Ann. § 200.408 (LexisNexis 2012); Ohio Rev. Code Ann. § 2901.01(A)(9) (LexisNexis 2014); Okla. Stat. Ann. tit. 21, § 1287.1 (West 2002).

It would be remarkable if a formulation that legislatures have so widely used in criminal statutes were unconstitutionally vague. And no convincing reason exists to believe it is. A statute that relies on the finding of a type or degree of risk is not vague, because it does not authorize criminal sanctions based on "wholly subjective judgments," such as "whether the defendant's conduct was 'annoying' or 'indecent,'" *Williams*, 553 U.S. at 306, or inherently indefinite terms such as "unjust or unreasonable rate[s]," *L. Cohen Grocery Co.*, 255 U.S. at 89 (citation omitted). When liability depends on risk, no "indeterminacy" exists about what fact must be established: "risk" in this context connotes a possibility that physical injury will occur in the course of committing the offense. See *Oxford English Dictionary* (3d ed. June 2010), http://www.oed.com (risk: "the possibility of loss, injury, or other adverse or unwelcome circum-

stance"). The adjective "potential" reinforces the "inherently probabilistic" nature of the inquiry. *James*, 550 U.S. at 207. And an adjective like "serious," "substantial," or "grave" indicates a "quantitative measure of risk." *Begay*, 553 U.S. at 152 (Scalia, J., concurring in the judgment). The natural implication is that something more than a minimal possibility is required, even if the eventuality need not be "a certainty." *James*, 550 U.S. at 207-208.

It is true that terms like "risk," "serious risk," and "substantial risk" can connote different quantitative levels of risk to different people. One person might think that a "serious risk" is a ten percent chance, while another person might think that one percent suffices. But the criminal law has always tolerated that sort of range of quantitative understanding of a general term; the same variation exists in the foundational "beyond a reasonable doubt" standard, after all. As this Court has long understood, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. Manslaughter, for example, is often defined as homicide committed under "extreme" mental or emotional disturbance, and rape can be defined to include sexual intercourse compelled through a threat of "serious" bodily injury. Model Penal Code §§ 210.3(1)(b), 213.1(1)(a) (1985). Different factfinders may have different conceptions of what "extreme" and "serious" mean. But that sort of ambiguity has never been thought to render a statute vague.

A risk-based formulation thus sets forth "an imprecise but comprehensible normative standard," rather than "no standard" at all. *Coates*, 402 U.S. at 614. Accordingly, the residual clause could be unconstitu-

tionally vague only if the features that distinguish it from the many other risk-based criminal statutes render it indeterminate in every case. They do not. To the contrary, they sharpen the understanding of the degree of risk that the statute contemplates and promote its uniform application.

2. The distinguishing features of the residual clause make its enforcement more predictable and uniform

Three features of the residual clause distinguish it from other statutes that impose criminal consequences for conduct that creates a risk of harm: (i) the statute focuses on the risk posed by the offense generally, not the offender's specific conduct; (ii) the word "otherwise" indicates that the enumerated offenses themselves involve a level of risk that satisfies the residual clause; and (iii) "risk" is modified by the adjectival phrase "serious potential." The first two differences, far from pointing towards vagueness, make the residual clause more concrete in application than other criminal statutes tied to risk. The third difference at worst represents a subtle redundancy for emphasis; it would not support invalidating the entire provision.

a. *Risk posed by the offense generally.* As discussed above (see pp. 13-14, *supra*), in deciding whether an offense falls under the ACCA's residual clause, a court analyzes whether the conduct encompassed by the elements of the offense presents such a risk generally, regardless of the manner in which the felon actually committed the crime. Thus, for example, it is irrelevant that a felon never intended to attack a homeowner during a burglary that he attempted. Because attempted burglary generally poses a risk of dangerous confrontations, it qualifies. See *James*, 550 U.S. at 208-209. That analysis reflects the

"categorical approach" that this Court has employed for statutes that impose liability based on convictions for particular classes of offenses, including the enumerated-crimes clause of the ACCA. See, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990) (ACCA burglary); see also, *e.g.*, *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013); *Leocal*, 543 U.S. at 7. It "avoids the practical difficulty of trying to ascertain at sentencing, perhaps from a paper record mentioning only a guilty plea, whether the present defendant's prior crime, as committed on a particular occasion, did or did not involve violent behavior." *Chambers* v. *United States*, 555 U.S. 122, 125 (2009).

The categorical approach, far from raising vagueness concerns, makes the statute's application more predictable and uniform than the typical statute that imposes criminal liability or sentencing consequences for risky conduct on a particular occasion. Whether a given offense falls within the residual clause is a pure question of law, subject to appellate review. That process promotes predictability and consistent application across offenders. For example, any felon who has, say, a Florida attempted-burglary conviction on his record knows that it qualifies as an ACCA predicate. The clarification of the law through appellate decisions affords at least as much certainty and predictability, if not more, than would a case-specific determination about whether a felon's particular conduct during the attempted burglary actually posed the requisite risk.

Of course, if an appellate court has not yet determined whether a particular offense qualifies, a "prospective criminal" might still be uncertain about whether he would be subject to the ACCA's penalties.

But that is inherent in a criminal process that depends on specific cases and appellate review to clarify statutory rules. And it is hard to see how that level of uncertainty could render the residual clause *less* clear than the typical reckless-endangerment or child-abuse offense, under which a defendant often will have no firm idea about whether a jury will later conclude that his conduct presented the requisite risk. See *United States* v. *Powell*, 423 U.S. 87, 93 (1975) ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." (quoting *Nash* v. *United States*, 229 U.S. 373, 377 (1913)).

Petitioner also objects (Supp. Br. 41-42) that in evaluating whether an offense generally poses a sufficient risk, courts may consult empirical data and other factual material not available to the felon when planning whether to illegally acquire a firearm. But the use of such data surely *reduces* fair-notice and discriminatory-enforcement concerns as compared to the typical jury verdict, which will often rest on jurors' ad hoc assessment of risk on a particular occasion. Testing risk assessments against empirical data makes decisions less subjective, not more.

It is true, as Justice Scalia observed in *Sykes*, "that the average citizen"—or, more specifically, the average three-time felon—would not "be familiar with the sundry statistical studies" that courts may consult for particular offenses. 131 S. Ct. at 2286 (dissenting). But it is even less likely that the average felon could make any confident prediction about whether a fact-finder would later decide that a particular course of conduct, with its many case-specific variables, posed a sufficient risk of physical injury to another person.

Yet that kind of uncertainty has never been understood to raise constitutional concerns. And in any event, under ordinary risk-based criminal statutes, courts and juries *do* consider empirical data.[3] Petitioner cites no case in which a court has suggested that the use of such studies to confirm or refute judgments about risk renders a criminal provision vague.

b. *The enumerated offenses.* The ACCA's residual clause also differs from other risk-based criminal statutes in that it gives examples of offenses that satisfy its standard: burglary, extortion, arson, and offenses involving the use of explosives. 18 U.S.C. 924(e)(2)(B)(ii). As this Court has explained, the word "otherwise" indicates that those listed crimes each present a level of risk that satisfies the residual clause. See *Sykes*, 131 S. Ct. at 2273.[4]

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[3] See, *e.g.*, *State* v. *Cummings*, 305 P.3d 556, 567 (Kan. 2013) (holding in child-endangerment prosecution that "the State can meet its burden * * * by referring to medical treatises or statistics on the risk of death from certain infant sleeping arrangements"); *State* v. *Chavez*, 211 P.3d 891, 904 (N.M. 2009) (explaining that in prosecution for child abuse by endangerment, the government may "refer[] to medical journals or treatises on the risks and causes of infant suffocation or statistical information on the risk of death from certain infant sleeping arrangements"); *Williams* v. *State*, 235 S.W. 3d 742, 757-758, 760 & n.54 (Tex. Crim. App. 2007) (relying in part on empirical data to verify that taking a child to a house without working utilities does not "raise[] a substantial and unjustifiable risk of injury"); see also *United States* v. *Babul*, 476 F.3d 498, 503 (7th Cir.) (Easterbrook, J.) ("Many parts of the Guidelines, in addition to statutes such as 18 U.S.C. § 16(b), pose the question whether a particular activity creates a risk of bodily injury or death. Numbers rather than words must supply the answers."), cert. denied, 551 U.S. 1126 (2007).

[4] Petitioner suggests in passing (Supp. Br. 7-8) that this Court has misconstrued the word "otherwise" because that word means

Petitioner contends (Pet. 7-8) that the enumeration of specific offenses posing the requisite risk contributes to the asserted vagueness of the residual clause. But that has it exactly backwards: The enumeration of the offenses makes the residual clause clearer, because it puts felons on notice that all offenses that are at least as risky as the enumerated crimes qualify as ACCA predicates. In contrast, most risk-based criminal statutes have no such textual anchors at all.

Justice Scalia has argued that the enumerated offenses render the residual clause more uncertain because the crimes "have little in common with respect to the supposedly defining characteristic" (*i.e.*, risk). *Sykes*, 131 S. Ct. at 2288 (Scalia, J., dissenting) (quoting *James*, 550 U.S. at 230 n.7 (Scalia, J., dissenting)). Embracing that reasoning, petitioner quotes (Supp. Br. 8) Justice Scalia's linguistic example: "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." 131 S. Ct. at 2288.

That reasoning is faulty, and the analogy inapt. Navy blue is simply not red at all; it cannot be placed on a spectrum of redness. But all of the enumerated

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"in a *different* way or manner." He is mistaken: The word indicates that both the enumerated crimes and residual-clause crimes all pose a "serious potential risk of physical injury to another," albeit potentially in different ways. See *Begay*, 553 U.S. at 144; cf., *e.g.*, 18 U.S.C. 798(a) (imposing criminal liability on "[w]hoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person * * * any classified information").

crimes pose some degree of risk of physical injury to other people, even if the risk levels differ. That creates no indeterminacy. It would raise no eyebrows for a statute to refer to "elephants, hippos, lions, orangutans, and all other large zoo animals," even though elephants are significantly larger than orangutans. Such a statute would sensibly be read to exclude cockatiels and bullfrogs, though not tigers or giraffes. So too here: That the enumerated crimes may vary significantly in their levels of risk does not render the statute "incomprehensible" (Pet. Supp. Br. 36), or even particularly awkward. The natural inference is that each enumerated offense presents a level of risk that suffices under the residual clause, even if the offenses are dissimilar in their degree of risk or other characteristics.

c. *"Serious Potential Risk."* The word "risk" in the residual clause is modified by the adjectival phrase "serious potential." Petitioner contends (Supp. Br. 8) that those "three words * * *, read together, have almost no clear meaning" because they "represent a confounding mix of contradiction and redundancy." That argument lacks merit.

As petitioner agrees (Supp. Br. 9), the word "serious" signifies that the risk of physical injury presented by a prior offense must be more than "scant" or "remote." See p. 25, *supra*. Nothing is vague about that—no more so than phrases in many other statutes that refer to a "substantial risk," "grave risk," or "unreasonable risk." Petitioner argues (Supp. Br. 9-10), however, that the word "potential" renders the entire phrase meaningless. That is not so. This Court has already construed that term to indicate only that the residual clause does not require "metaphysical

certainty" that a particular offense, on every occasion, poses the requisite risk. *James*, 550 U.S. at 207. In that sense, the word "potential" confirms that Congress intended the residual clause to be applied by examining the ordinary case of the commission of the offense. Without "potential," courts might have construed the statute to require that the "serious risk" be present in every conceivable way of committing the offense.

But even if the Court were unsure of the work that the word "potential" was intended to do, the answer would not be to hold the residual clause unconstitutional. Rather, like such common statutory phrases as "close proximity" and "false pretenses," "potential risk" should at most be read as a subtle redundancy, perhaps to emphasize that the statute is truly concerned with the possibility for injury, not the certainty of it. It is not unusual for a technical redundancy to serve such a clarifying function. See, *e.g.*, *DePierre* v. *United States*, 131 S. Ct. 2225, 2232 (2011) ("Congress' choice to use the admittedly redundant term 'cocaine base' to refer to chemically basic cocaine is best understood as an effort to make clear that clause (iii) does not apply to offenses involving powder cocaine or other nonbasic cocaine-related substances."). But a redundancy would not justify voiding the provision on the farfetched theory that "prospective criminals" would have clearer notice of the sentencing ramifications of illegally acquiring a gun if the ACCA said "serious risk" or "substantial risk" rather than "serious potential risk."

3. Petitioner does not identify how Congress could have written the ACCA more clearly while achieving the same purpose

For the foregoing reasons, this Court has correctly concluded that the residual clause's text is sufficiently clear for due-process purposes. Congress chose a close variant of a common risk-based formulation, and it used that phrasing in a statutory context that is less likely than ordinary criminal statutes to give rise to inconsistent or unpredictable application. As the provision's drafting history demonstrates, that formulation was the product of Congress's considered judgment about how best to address dangerous recidivists. Both houses of Congress focused on risk-based formulations, evidently adding the enumerated-crimes clause only as a compromise measure. See pp. 3-5, *supra*.

Petitioner suggests throughout his supplemental brief (at 5, 36, 47-48) that invalidating the residual clause is necessary to spur Congress to redraft that provision and clear out federal courts' ACCA dockets. That suggestion hardly comports with the "principle that it is for the legislature, not the court, to define a crime and ordain its punishment." Pet. Supp. Br. 38-39 (quoting *United States* v. *Lacher*, 134 U.S. 624, 629 (1890)). As this Court explained in *Sykes* in rejecting the vagueness argument, Congress was well within its power to rely on a "normative principle," even if that "approach may at times be more difficult for courts to implement." 131 S. Ct. at 2277.

But more fundamentally, petitioner never actually identifies how Congress could realistically redraft the provision to achieve the same purpose: identifying all of the federal and state offenses that "show an in-

creased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 553 U.S. at 146. Congress could, in theory, expand the list of enumerated generic offenses, but that would simply replace courts' residual-clause dockets with a series of cases defining the new generic federal offenses and determining whether the many state-law variations suffice under the categorical and modified-categorical approaches. See, *e.g.*, *Descamps* v. *United States*, 133 S. Ct. 2276 (2013); *Taylor*, *supra*.

It is also conceivable that Congress could compile an "encyclopedic" list of every one of the thousands of state offenses that present the requisite risk. *Sykes*, 131 S. Ct. at 2277. But under that scheme, Congress would be forced not only to scour the statutory codes of every State, but also to canvass the decisions of each State's judiciary construing all potentially includable offenses. And Congress would then be compelled to update the statute periodically as state laws are amended, added, recodified, and construed. The Constitution does not require that entirely unrealistic degree of legislative attention to ensure that dangerous recidivists face higher penalties for gun possession.

The only alternative formulation that petitioner cites is a bill introduced in Congress in 2010. See Pet. Supp. Br. 47 n.29. That bill would have required courts to determine, based on "any reliable evidence" and "without regard to the formal elements of the crime," whether an offender's "conduct" underlying a prior offense "presented a serious potential risk of bodily injury to another." Armed Career Criminal Sentencing Act of 2010, S.4045, 111th Cong., 2d Sess.

7-8 (2010). But it is far from clear why a case-by-case, fact-based approach would afford more notice, predictability, or certainty to defendants or courts. Such an approach would eliminate some legal disputes about application of the categorical approach. But it would require a far more fact-intensive inquiry into conduct that was never subject to a prior finding by a jury or admission in a guilty plea. Future defendants may complain that such a regime might give them *less* certainty about exposure to the ACCA; by no stretch of the imagination could it be said that they would have *more* certainty.

C. This Court's Interpretation Of The Residual Clause Enables Its Principled Application

Petitioner devotes a great deal of his supplemental brief (at 5, 12-36) to arguing that this Court's interpretation and application of the ACCA's residual clause has failed to create an "intelligible analytical framework" and has left lower courts "hopelessly adrift." That is wrong. This Court's most recent precedent makes clear that to decide whether an offense falls under the residual clause, a court should make a commonsense judgment about the risk posed by the offense in the ordinary case. See *Sykes*, 131 S. Ct. at 2275-2276. Courts applying that "categorical and manageable standard" can draw on the conventional tools of judicial decisionmaking—case law, legislative findings, empirical evidence, the recommendations of the expert Sentencing Commission—to reach principled determinations. *Ibid.* Although certain classes of offenses will present hard cases, and thus will sometimes produce conflicts among courts of appeals, that does not mean that the residual clause is unconstitutional. And if portions of this Court's opin-

ions have made the statute harder to apply, the proper remedy would be to refine or clarify those statements, not to facially invalidate a federal statutory provision.

1. This Court's decisions require a practical assessment of whether the commission of the offense ordinarily entails a serious risk of injury to other people

Echoing Justice Scalia's dissent in *Sykes*, petitioner contends (Supp. Br. 24) that this Court's decisions have vacillated between inconsistent standards for applying the residual clause. That is not a fair reading of the cases. Three of the Court's four decisions—*James*, *Chambers*, and *Sykes*—rendered a basic judgment about the level of risk posed by attempted burglary, failure to report to prison, and vehicular flight, respectively. Petitioner seizes on the offense-specific analysis in those cases to suggest that the Court was applying entirely different standards. That contention is unfounded.

In *James*, for example, the Court did not purport to set out a universal "closest analog" test (Pet. Supp. Br. 13) requiring courts in each case to identify the most similar offense among the enumerated offenses (an inquiry that would often be fruitless). The Court merely held that it sufficed to resolve that case that attempted burglary was at least as risky as burglary, and it was unnecessary to go beyond that. See 550 U.S. at 203. That was consistent with this Court's ordinary reluctance to "clarify the entire field" in the course of its "first in-depth examination" of an important provision of law. *District of Columbia* v. *Heller*, 554 U.S. 570, 635 (2008).

In the same way, *Chambers* and *Sykes* each conducted a focused application of the risk standard to

the offenses at issue. *Chambers* held, after consulting a Sentencing Commission report, that a person who fails to report to prison is not "significantly more likely than others to attack, or physically to resist, an apprehender" and therefore that the offense does not pose a special risk of physical injury to others. 555 U.S. at 127-130; see *Sykes*, 131 S. Ct. at 2275 (explaining that *Chambers*'s holding relied on a "levels of risk" analysis). And *Sykes* reached the "commonsense conclusion" that vehicular flight under Indiana law poses the requisite risk after comparing the risk posed to that of the enumerated offenses, in part relying on empirical data. See *id.* at 2273-2277; accord *id.* at 2278-2281 (Thomas, J., concurring in the judgment). Neither decision announced a new test. To the contrary, *Sykes* made clear that "risk levels provide[d] a categorical and manageable standard" to resolve the case. *Id.* at 2275-2276; accord *id.* at 2278 (Thomas, J., concurring in the judgment).

This Court's decision in *Begay* did employ a standard that differed from the risk analysis of *James*, *Chambers*, and *Sykes*. The Court held that drunk driving does not fall within the residual clause because it is not "purposeful, violent, and aggressive." 553 U.S. at 142-148. The Court developed that criterion based on the view that residual-clause offenses must be similar to the enumerated offenses on dimensions other than risk levels, and it concluded that limiting the clause to "purposeful, violent, and aggressive" offenses best comported with the ACCA's purpose because such crimes are "characteristic of the armed career criminal." *Id.* at 142-145 (citation omitted). Four Justices disagreed with *Begay*'s approach at the time, predicting that it could foster confusion in lower

courts. See *id.* at 150-153 (Scalia, J., concurring in the judgment); *id.* at 158-160 (Alito, J., dissenting).

But *Sykes* went a long way toward dispelling the potential confusion by limiting *Begay*'s standard to offenses lacking a degree of *mens rea*. *Sykes* recognized that "the purposeful, violent, and aggressive formulation" lacks any "precise textual link to the residual clause," and explained that it "was used in [*Begay*] to explain the result" in a case that involved "involved a crime akin to strict liability, negligence, and recklessness crimes." 131 S. Ct. at 2275-2276. The Court indicated that for any other offense, the focus of the analysis should be on the risk presented by the offense. *Ibid.*; accord *id.* at 2277 (Thomas, J., concurring in the judgment) (rejecting use of *Begay* standard for any offense).

Accordingly, whatever confusion the *Begay* standard injected into the analysis, it is now limited to, at most, offenses akin to strict-liability, negligence, and recklessness crimes. For that reason alone, *Begay* could not support an argument that the residual clause is "impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 495. And in any event, were this Court to harbor serious reservations about the indeterminacy of the *Begay* standard, the remedy would be to reconsider the reasoning of *Begay* (though not necessarily the holding, see *Begay*, 553 U.S. at 153-154 (Scalia, J., concurring in the judgment)), either by rejecting its test altogether, or by adopting a more administrable "similar in kind" approach to crimes with less stringent *mens rea* elements. See *United States* v. *Velázquez*, 777 F.3d 91, 97-98 (1st Cir. 2015) (interpreting *Begay* in light of its purpose "to restrict armed career criminal treatment

to those who 'might deliberately point the gun and pull the trigger'") (quoting *Begay*, 553 U.S. at 146).

2. Courts are well positioned to conduct the necessary risk analysis

This Court has correctly concluded that the risk-based analysis it employed in *James*, *Chambers*, and *Sykes* "provide[s] a categorical and manageable standard" to resolve residual-clause questions. *Sykes*, 131 S. Ct. at 2275-2276. The first step of the analysis—identifying the conduct covered by the elements of the prior offense—is the same inquiry that courts must conduct under the enumerated-crimes clause and other statutes. See *Descamps*, 133 S. Ct. at 2283. The second step—determining whether the ordinary case of that conduct presents the requisite risk—calls upon courts to render a commonsense judgment that they are well positioned to make. *Sykes*, 131 S. Ct. at 2274.

That second-step judgment has two components: identifying the "ordinary case" and assessing the risk presented by that case. Neither poses serious practical barriers to the residual clause's principled application.

a. *Ordinary case.* In *James*, this Court explained that the only feasible way to determine whether an offense poses a serious risk of physical injury is to consider the "ordinary case" of the commission of that offense. 550 U.S. at 208. That is because "[o]ne can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury." *Ibid.* If the test were instead whether "every conceivable factual offense covered by a statute" presents the requisite risk, *ibid.*, not even the enumerated offenses would qualify—an interpre-

tation incompatible with the text of the statute. See note 4, *supra*.

For example, as the Court explained in *James*, "one could imagine an extortion scheme where an anonymous blackmailer threatens to release embarrassing personal information about the victim unless he is mailed regular payments," in which case "the risk of physical injury to another approaches zero." 550 U.S. at 208. Likewise, a person could burglarize or set fire to an unoccupied house in a remote area. Similar scenarios exist for virtually any offense. If the Court did not ground its analysis in the "ordinary case," therefore, the residual clause would achieve little (particularly given that the elements clause already includes crimes involving the use, attempted use, or threatened use of violent force) and its interpretation would be at odds with the theory of including the enumerated offenses.

At the same time, however, the ordinary-case inquiry is not an exercise in judicial imagination. That is in part because the inquiry has a critical limiting principle: A court examines only the "subset of [violations] where the offender has been apprehended, prosecuted, and convicted." *James*, 550 U.S. at 204. The ACCA's focus is convictions, not unprosecuted violations. *Ibid.* And for that reason, a court is not left to speculate about what the ordinary instance of an unpunished violation might entail. Rather, judges can consult their deep well of experience reviewing criminal convictions and sentencing decisions, fortified by reported decisions, the determinations of the Sentencing Commission, legislative judgments, and empirical data, to make a commonsense judgment about what conduct underlies the ordinary conviction.

Those determinations are well within the judicial ken. In many cases, "the severity of the risk will be obvious." *Begay*, 553 U.S. at 154 (Scalia, J., concurring in the judgment). In other cases, a judge's "common sense and experience," *Sykes*, 131 S. Ct. at 2291 (Kagan, J., dissenting), will be quickly confirmed by judicial precedents or the Sentencing Commission's conclusions. In still other cases, reported decisions or empirical data may demonstrate that the crime is often committed in non-risky ways, despite a judge's initial assumption to the contrary. See, *e.g.*, *Chambers*, 555 U.S. at 128-130. And in rare cases, a court may be left with no firm idea about what the ordinary case looks like. If so, the defendant wins. But the fact that cases will arise in which courts find it too difficult to identify the ordinary case does not justify invalidating the residual clause in every application.

This Court's decision in *Sykes* exemplifies the proper approach to identifying the ordinary case. The defendant had been convicted of Indiana's vehicular-flight offense, which required that the defendant flee in a vehicle after an officer ordered him to stop, rather than the form of the offense involving "operat[ing] a vehicle in a manner that creates a substantial risk of bodily injury to another person." 131 S. Ct. at 2271, 2276 (quoting Indiana statute). Even though the section under which the defendant was convicted did not, by definition, require that the flight be conducted in a way that posed a risk, the Court concluded based on common sense, real-world experience, and available empirical evidence that, as a general matter, "[s]erious and substantial risks are an inherent part of vehicle flight." *Id.* at 2276; accord *id.* at 2278 (Thomas, J., concurring in the judgment). Indeed, even the Justic-

es who dissented on the statutory holding concluded that "the majority's intuition that dangerous flights outstrip mere failures to stop—that [this] form of the activity is also the ordinary form—seems consistent with common sense and experience," and would probably have supported the application of the ACCA if Indiana had not separately defined a flight offense involving "substantial risk of bodily injury" as an element. *Id.* at 2291-2292 (Kagan, J., dissenting). That eight Justices had little trouble identifying the typical case of vehicular flight in *Sykes* demonstrates that the ordinary-case inquiry does not pose insuperable barriers to applying the residual clause in a principled manner.

b. *Risk analysis.* Once a court identifies the ordinary case, it must render a judgment about whether that case involves a serious risk of injury to other people. For the reasons discussed above (pp. 22-26, *supra*), that judgment does not differ from the kind of determinations that factfinders make all the time in deciding whether a defendant's conduct posed a sufficiently great risk under a general criminal standard. To the contrary, it is substantially more objective, since it can be checked against the views of the Sentencing Commission, empirical data, case law, and legislative findings; individual determinations must be consistent with binding precedent addressing similar offenses under the residual clause; and the analysis does not depend on myriad case-specific variables and the availability of case-specific evidence.

In conducting that analysis, courts must keep in mind that different crimes can pose a risk of physical injury in different ways. That is clear from the enumerated offenses. Arson and the illegal use of explo-

sives "entail[] intentional release of a destructive force dangerous to others." *Sykes*, 131 S. Ct. at 2273. But burglary and extortion are different. Each of those offenses become dangerous only if, in the course of perpetrating the offense, the offender commits an act of violence against someone else—the victim, a police officer, a bystander. (The statute's concern is violence to "another," not the risk that the offender himself will be injured.) For example, extortion leads to violence against someone other than the extortionist only if the extortionist elects to follow through on a threat of violence, and burglary poses a risk only if the burglar decides to use force when confronted. In addition, other crimes may entail types of risk not present in the enumerated crimes.

But although the risk of injury can arise in different ways, there are many offenses that no reasonable jurist would consider to pose a risk of physical injury in any manner. It would be the rare case in which a person who mails a fraudulent insurance form, or downloads child pornography, engages in a physical confrontation with someone while committing the offense or otherwise injures another person. Some offenses may present closer questions. In every case, however, a court must consult "common sense and real world experience" to render a sensible judgment about the risk posed by the offense. *Sykes*, 131 S. Ct. at 2280 (Thomas, J., concurring in the judgment). This Court did not find that task prohibitively difficult in *James*, *Chambers*, and *Sykes*. And where a court truly finds itself uncertain as to the risk posed by an offense in the ordinary case, the defendant must prevail, because the government has not met its burden. A defendant is thus protected against the application

of the ACCA in truly uncertain cases without the need to resort to the constitutional heavy artillery of the vagueness doctrine.

3. This Court's unique docket can produce a skewed impression about the difficulty of applying the residual clause in practice

This Court typically grants certiorari on questions of statutory interpretation to resolve disagreements among the circuits. That unique docket, however, can produce a skewed impression about the difficulty of applying the residual clause in the run of cases, because this Court decides only the questions that have given rise to serious disagreements among the courts of appeals.

But many easy cases never reach this Court. As discussed above, lower courts have held that a range of obviously dangerous crimes fall within the residual clause—crimes that do not involve the use, attempted use, or threatened use of violent force and are not among the enumerated crimes, but that nevertheless pose obviously high risks of physical injury. Those crimes include such inherently dangerous conduct as child abuse, solicitation to commit aggravated assault, larceny from a person, and the malicious discharge of a firearm at an occupied building. See pp. 8-9, *supra*. Those cases do not pose hard questions under the residual clause. And numerous other crimes that have not yet been the subject of reported appellate decisions would surely would qualify under any analysis, like providing material support for terrorism, 18 U.S.C. 2339B(a)(1), producing chemical weapons, 18 U.S.C. 229(a), solicitation to commit murder, *United States* v. *Cox*, 74 F.3d 189, 190 (9th Cir. 1996) (Guidelines), and illegally acquiring a torpedo, see 13-7120

Tr. of Oral Arg. 34, at *ll.*17-21 (Nov. 5, 2014); 26 U.S.C. 5845(f), 5861(c).

Moreover, some offenses that one might expect to fall under the ACCA's elements clause, like rape, may not qualify under that prong of the ACCA because they are statutorily defined to include the remote possibility of being accomplished through a means other than violent force (*e.g.*, fraud), and the charging documents will not necessarily indicate the subset of the offense under which the defendant was convicted. See, *e.g.*, Tenn. Code Ann. § 39-13-503 (2014); *Dawson* v. *United States*, 702 F.3d 347, 351-353 (6th Cir. 2012); see also *United States* v. *Terrell*, 593 F.3d 1084, 1088-1091 (9th Cir. 2010), cert. denied, 131 S. Ct. 2094 (2011). But under the residual clause, the "ordinary case" of a rape conviction and the risks of physical injury associated with rape are not hard to determine. *Id.* at 1090 ("[R]ape is a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist.") (internal quotation marks and emphases omitted); see also *Dawson*, 702 F.3d at 352 (explaining that rape, "even when perpetrated by fraud, creates an inherently high degree of risk of physical injury"). The residual clause thus ensures that individuals with three convictions for serious violent crimes that technically do not fall under the elements clause cannot avoid the ACCA's heightened penalty.

At the other end of the spectrum, many classes of offenses obviously do not fall within the residual clause. Those include all manner of financial and tax fraud, embezzlement, identity theft, bribery, child-pornography possession, money laundering, counterfeiting, illegal gambling, and obstruction of justice.

And still other crimes exist that, even if they might otherwise have raised a colorable question, the government agrees do not qualify, such as the basic felon-in-possession offense, 18 U.S.C. 922(g)(1). See 13-7120 Tr. of Oral Arg. 32, at *ll.*13-23 (Nov. 5, 2014).

Between those two poles are closer cases. But petitioner significantly overstates (Supp. Br. 26-36) the degree of circuit disagreement on the hard issues, particularly in the wake of this Court's clarifying opinion in *Sykes* four years ago. For example, the government is not aware of any post-*Sykes* case holding that a fleeing-and-eluding statute falls outside the residual clause; petitioner cites only dissenting opinions, while acknowledging that "*Sykes* largely resolved the dispute." *Id.* at 34. Similarly, since this Court decided *Chambers*, lower courts have been almost uniform in concluding that among custody-escape offenses, only escapes from secure custody—that is, something akin to a jailbreak—satisfy the residual clause. See, *e.g.*, *United States* v. *Tucker*, 740 F.3d 1177, 1183 (8th Cir. 2014) (en banc); *United States* v. *Covington*, 738 F.3d 759, 765-767 (6th Cir. 2014) (Guidelines); *United States* v. *Proch*, 637 F.3d 1262, 1267-1269 (11th Cir. 2011); *United States* v. *Hart*, 578 F.3d 674, 681 (7th Cir. 2009) (Guidelines). But cf. *United States* v. *Hughes*, 602 F.3d 669, 676-677 (5th Cir. 2010) (concluding that *Chambers* did not overrule prior circuit precedent holding that escape from an institution qualifies under the residual clause), cert. denied, 131 S. Ct. 3018 (2011).

In addition, petitioner cites (Supp. Br. 31) conflicting decisions issued before the Court's decision in *James* established the basic framework for deciding residual-clause issues; it is not clear that those con-

flicts will persist if litigation over the offenses at issue arises again. Some of the purported "conflicts" cited by petitioner and his amicus, moreover, may merely reflect differences in the definition of offenses among different States. And in some cases, panels simply misapplied this Court's settled framework to a particular offense; for such decisions, the government may seek en banc review in the relevant circuit if the question recurs. See, *e.g.*, *United States* v. *Prater*, 766 F.3d 501, 513-518 (6th Cir. 2014) (holding that third-degree burglary under New York law does not categorically fall within the residual clause); see also *id.* at 519-523 (Batchelder, J., dissenting).

It is true that some circuit conflicts may ultimately require this Court's resolution. And this Court may be called upon to resolve some broader questions that cut across offenses, such as whether recklessness offenses (*e.g.*, reckless homicide) can qualify in light of *Begay* or any modification of *Begay*'s doctrine. But even some of the issues currently subject to circuit conflicts may resolve themselves in light of *Sykes*. For example, a number of circuit decisions holding that certain sexual crimes against minors do not qualify as ACCA predicates relied on the proposition that an intentional but "consensual" sexual act inflicted on a minor is not "violent" or "aggressive" under *Begay*. See, *e.g.*, *United States* v. *Christensen*, 559 F.3d 1092, 1095 & n.2 (9th Cir. 2009) (noting that before *Begay* the Ninth Circuit had concluded otherwise under the career-offender guideline); *United States* v. *Thornton*, 554 F.3d 443, 449 (4th Cir. 2009) (holding that Virginia "carnal knowledge" offense fails *Begay* standard even though "nonforcible adult-minor sexual activity can present grave physical risks to minors"); *United*

States v. *Harris*, 608 F.3d 1222, 1224, 1227-1233 (11th Cir. 2010) ("Even though [sexual battery of a child under 16] fits in the plain language of the statute, we must apply the holding of *Begay*."); see also *United States* v. *Goodpasture*, 595 F.3d 670, 671-672 (7th Cir. 2010). And the one circuit to hold that possession of a weapon in prison does not qualify (overruling its precedent to the contrary) relied entirely on *Begay*, while acknowledging that the offense "no doubt * * * involves a high degree of risk." *United States* v. *Polk*, 577 F.3d 515, 518-520 (3d Cir. 2009). Those conflicts may dissolve in light of *Sykes*.

In characterizing lower-court decisions as "wildly divergent" and "all over the map" (Pet. Supp. Br. 5, 26), petitioner thus exaggerates the difficulty of applying the residual clause in practice under the standards that this Court has set out, particularly in *Sykes*. And in any event, petitioner's more "basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague." *Williams*, 553 U.S. at 305. There is no "indeterminacy of precisely what" the residual clause targets. *Id.* at 306. It asks a court to determine whether the ordinary case of an offense resulting in a conviction poses a serious potential risk of physical injury—a risk that is more than "remote" or "scant" (Pet. Supp. Br. 9). That the question can be hard to answer for certain classes of offenses does not justify voiding the statute in its entirety.

D. *Stare Decisis* Considerations Militate Strongly Against Invalidating The Residual Clause

This Court has held—twice—that the residual clause is not unconstitutionally vague. See *James*, 550 U.S. at 210 n.6; *Sykes*, 131 S. Ct. at 2277. Although

defendants in those cases did not squarely argue that the statute was vague, the Court reaffirmed that constitutional holding in *Sykes* over a substantial dissent by Justice Scalia. See Reply Br. at 17-20, *James*, *supra* (No. 05-9264) (arguing that the government's interpretation raised vagueness concerns).

Those recent decisions are entitled to *stare decisis* effect. Under that bedrock principle, the Court generally does not overrule one of its prior decisions absent a special justification. *United States* v. *International Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996). No such special justification has arisen since *Sykes* four years ago. Petitioner has not demonstrated that conflicts among lower courts have proliferated since 2011, or that *Sykes*'s analysis has fostered confusion. To the contrary, in cabining the scope of *Begay*'s extratextual gloss, *Sykes* has simplified the judicial task by directing courts to focus exclusively on the "categorical and manageable standard" of "risk levels" in most cases. 131 S. Ct. at 2275-2276.

Important considerations, moreover, weigh against overruling *James* and *Sykes*. According to the Sentencing Commission, from 2008 to 2013, over 3500 defendants were sentenced under the ACCA, and over 13,500 were sentenced under the materially identical career-offender guideline. See U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, tbl. 22 (2008-2013). Although the available statistics do not break out how many of those offenders had at least one predicate offense that fell within the residual clause of the ACCA or the career-offender guideline, it is unlikely to be a trivial number in light of the many reported appellate decisions on residual-clause issues.

The availability of the ACCA penalty undoubtedly influenced charging decisions in the period since this Court held in *James* that the residual clause is not unconstitutionally vague. For example, a prosecutor who had an open-and-shut case on a Section 922(g)(1) violation for a three-time felon believed to have committed more serious crimes might have been content to accept a guilty plea on the Section 922(g)(1) charge in light of the ACCA's 15-year minimum sentence. If this Court were to declare the statute void now, and hold that its ruling was retroactive, cf. *Bousley* v. *United States*, 523 U.S. 614, 620-621 (1998), it would unravel the consequences of the many charging decisions made in reliance on this Court's holdings. That would be true even for felons given ACCA sentences based on obviously dangerous offenses.

More broadly, declaring the residual clause irredeemably indeterminate would be extraordinary given that this Court itself has construed and applied it on four separate occasions, with only one Justice (in only one case) contending that the statute is incapable of being intelligibly applied. The Court would arguably be required to overrule the *statutory* holdings of all four of this Court's decisions, which presumably rested on the conclusion that the statute is amenable to principled interpretation. See p. 16, *supra*. Indeed, even two of the three dissenting Justices in *Sykes* agreed that the statute was capable being applied intelligibly. See *Sykes*, 131 S. Ct. at 2289-2290 (Kagan, J., dissenting). In no other circumstance, to the government's knowledge, has the Court struck down a statute as irremediably vague after the Court itself had applied the law repeatedly.

In that sense, holding the residual clause vague now would undermine the fundamental purpose of *stare decisis* to "foster[] reliance on judicial decisions" and "contribute[] to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). Citizens and the other branches of government are entitled to presume that when this Court authoritatively interprets a statutory provision, that means, at minimum, that the statute is capable of being interpreted. The fact that super-majorities of this Court have repeatedly found the residual clause sufficiently clear should make it all but impossible at this point to establish that it is unconstitutionally vague.

E. The Residual Clause Is Not Vague As Applied To Petitioner's Offense Of Unlawfully Possessing A Short-Barreled Shotgun

Petitioner contends (Supp. Br. 51-53) that even if the residual clause is not void in toto, it is vague as applied to him because, he asserts, possession of a short-barreled shotgun is not clearly covered by the statute's text, this Court's decisions interpreting it, or a consensus in the lower courts. A circuit conflict alone, of course, cannot render a statute vague. And if this Court were to agree with petitioner that the statute's text and this Court's interpretation of it, fairly applied, do not cover possession offenses of the type at issue here, then the rule of lenity, and not the doctrine of vagueness, would resolve this case.

But petitioner is wrong in finding it obscure whether his offense presents a "serious potential risk of physical injury to another" in the ordinary case. Unlawful possession of a short-barreled shotgun—a weapon long associated almost exclusively with horrif-

ic acts of violence—readily qualifies as an ACCA predicate offense under the residual clause. As the government explained in its opening brief (at 49-51), under Minnesota law, that offense has the requisite *mens rea*—intent to possess the weapon with knowledge of its characteristics. Indeed, the Minnesota Supreme Court has since confirmed that to convict a person for unlawful possession of a short-barreled shotgun, the State must "prove that [his] possession of the gun[] was knowing," because "statutory silence is typically insufficient to dispense with the mens rea requirement." *State* v. *Salyers*, 858 N.W.2d 156, 161 (2015) (citing *State* v. *Ndikum*, 815 N.W.2d 816, 822 (Minn. 2012)). And almost unique among firearm-possession offenses, the conclusion that the ordinary case presents a serious risk of physical injury is fortified by decades of legislative findings, the judgment of the Sentencing Commission, and this Court's longstanding view that short-barreled shotguns are "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. As even the reported decisions cited by petitioner in his three merits briefs make clear, the typical felon who was convicted of the illegal possession of a short-barreled shotgun acquired it for use in committing crimes, not for innocuous purposes.

Accordingly, even acknowledging that in cases of "grievous ambiguity," *Abramski* v. *United States*, 134 S. Ct. 2259, 2272 n.10 (2014) (citation omitted), the rule of lenity would favor the more lenient interpretation, no such ambiguity exists here: The ordinary case of illegal possession of a short-barreled shotgun presents a greater risk than burglary. People do not acquire those weapons illegally for target practice or

hunting. They acquire them to threaten, maim, and kill other people and to facilitate other violent crimes. And when the weapons are brought to crimes, the risk of serious injury or death increases dramatically. That has been the uniform understanding of courts and legislatures for decades, and petitioner has failed to demonstrate that those considered judgments no longer hold true.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A: FEDERAL STATUTES

18 U.S.C. 16 provides:

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 924(c)(3) provides:

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 1031(b) provides:

(b) The fine imposed for an offense under this section may exceed the maximum otherwise provided by law, if such fine does not exceed $5,000,000 and—

(1) the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or

(2) the offense involves a conscious or reckless risk of serious personal injury.

18 U.S.C. 1365(a) provides in pertinent part:

(a) Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate or foreign commerce, or the labeling of, or container for, any such product, or attempts to do so, shall—

(1) in the case of an attempt, be fined under this title or imprisoned not more than ten years, or both;

(2) if death of an individual results, be fined under this title or imprisoned for any term of years or for life, or both;

(3) if serious bodily injury to any individual results, be fined under this title or imprisoned not more than twenty years, or both; and

(4) in any other case, be fined under this title or imprisoned not more than ten years, or both.

* * * * *

(c)(1) Whoever knowingly communicates false information that a consumer product has been tainted, if such product or the results of such communication affect interstate or foreign commerce, and if such taint-

ing, had it occurred, would create a risk of death or bodily injury to another person, shall be fined under this title or imprisoned not more than five years, or both.

* * * * *

18 U.S.C. 1864(a) provides:

(a) Whoever—

(1) with the intent to violate the Controlled Substances Act,

(2) with the intent to obstruct or harass the harvesting of timber, or

(3) with reckless disregard to the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk,

uses a hazardous or injurious device on Federal land, on an Indian reservation, or on an Indian allotment while the title to such allotment is held in trust by the United States or while such allotment remains inalienable by the allottee without the consent of the United States shall be punished under subsection (b).

18 U.S.C. 2118(e) provides:

(e) For purposes of this section—

(1) the term "controlled substance" has the meaning prescribed for that term by section 102 of the Controlled Substances Act;

(2) the term "business premises or property" includes conveyances and storage facilities; and

(3) the term "significant bodily injury" means bodily injury which involves a risk of death, significant physical pain, protracted and obvious disfigurement, or a protracted loss or impairment of the function of a bodily member, organ, or mental or sensory faculty.

18 U.S.C. 2246(4) provides:

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

18 U.S.C. 2258B(b) provides in pertinent part:

(b) INTENTIONAL, RECKLESS, OR OTHER MISCONDUCT.—Subsection (a) shall not apply to a claim if the electronic communication service provider, remote computing service provider, or domain name registrar, or a director, officer, employee, or agent of that electronic communication service provider, remote computing service provider, or domain name registrar—

(1) engaged in intentional misconduct; or

(2) acted, or failed to act—

(A) with actual malice;

(B) with reckless disregard to a substantial risk of causing physical injury without legal justification; or

* * * * *

18 U.S.C. 2258D(b) provides in pertinent part:

(b) INTENTIONAL, RECKLESS, OR OTHER MISCONDUCT.—Subsection (a) shall not apply to a claim or charge if the National Center for Missing and Exploited Children, or a director, officer, employee, or agent of such center—

(1) engaged in intentional misconduct; or

(2) acted, or failed to act—

(A) with actual malice;

(B) with reckless disregard to a substantial risk of causing injury without legal justification; or

* * * * *

18 U.S.C. 2332b(a)(1) provides:

(a) PROHIBITED ACTS.—

(1) OFFENSES.—Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)—

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or

(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;

18 U.S.C. 3286(b) provides:

(b) NO LIMITATION.—Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense listed in section 2332b(g)(5)(B), if the commission of such offense resulted in, or created a forseeable[1] risk of, death or serious bodily injury to another person.

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[1] So in original. Probably should be "foreseeable".

APPENDIX B: STATE STATUTES

Alabama

Ala. Code § 13A-6-24(a) (LexisNexis 2005) provides:

(a) A person commits the crime of reckless endangerment if he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Ala. Code § 13A-6-41(a) (LexisNexis 2005) provides:

(a) A person commits the crime of unlawful imprisonment in the first degree if he restrains another person under circumstances which expose the latter to a risk of serious physical injury.

Ala. Code § 13A-6-20(a)(3) (LexisNexis Supp. 2014) provides in pertinent part:

(a) A person commits the crime of assault in the first degree if:

* * * * *

(3) Under circumstances manifesting extreme indifference to the value of human life, he or she recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person;

Ala. Code § 13A-11-290(c)(1) (LexisNexis Supp. 2014) provides:

(c)(1) A licensed day care center, a licensed child care facility, a program providing day care service to incapacitated persons, or any other child care service that is exempt from licensing pursuant to Section 38-7-3, Code of Alabama 1975, or an employee thereof, or a person for hire responsible for a child under the age of 7 or an incapacitated person, shall not leave a child or an incapacitated person in a motor vehicle unattended in a manner that creates an unreasonable risk of injury or harm.

Alaska

Alaska Stat. § 11.41.250(a) (West Supp. 2013) provides:

(a) A person commits the crime of reckless endangerment if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Alaska Stat. § 11.61.190(a)(2) (2014) provides in pertinent part:

(a) A person commits the crime of misconduct involving weapons in the first degree if the person

* * * * *

(2) discharges a firearm from a propelled vehicle while the vehicle is being operated and under circumstances manifesting substantial and unjustifiable risk of physical injury to a person or damage to property.

Alaska Stat. § 11.81.900(a)(57)(A) (2014) provides:

(57) "serious physical injury" means

(A) physical injury caused by an act performed under circumstances that create a substantial risk of death;

Alaska Stat. § 11.41.255(1) (2014) provides:

Notwithstanding the definition of "serious physical injury" in AS 11.81.900(b), for the purpose of an offense against a child under 12 years of age under AS 11.41.200-11.41.250, unless the context requires otherwise, "serious physical injury" means

(1) physical injury caused by an act performed under circumstances that create a substantial risk of death;

Alaska Stat. § 11.56.700(a)(3) (2014) provides in pertinent part:

(a) A person commits the crime of resisting or interfering with arrest if, knowing that a peace officer is making an arrest, with the intent of preventing the officer from making the arrest, the person resists personal arrest or interferes with the arrest of another by

* * * * *

(3) any means that creates a substantial risk of physical injury to any person.

Alaska Stat. § 11.56.767(b)(1)(A) (2014) provides:

(b) In a prosecution under this section, it is an affirmative defense that the defendant

(1) did not report as soon as reasonably practicable because the defendant reasonably believed that

(A) doing so would have exposed the defendant or others to a substantial risk of physical injury;

Alaska Stat. § 11.51.200(a)(1) (2014) provides:

(a) A person commits the crime of endangering the welfare of a vulnerable adult in the first degree if the person

(1) intentionally abandons a vulnerable adult in any place under circumstances creating a substantial risk of physical injury to the vulnerable adult and the vulnerable adult is in the person's care

(A) by contract or authority of law; or

(B) in a facility or program that is required by law to be licensed by the state;

Alaska Stat. § 11.61.210(a)(3) (2014) provides in pertinent part:

(a) A person commits the crime of misconduct involving weapons in the fourth degree if the person

* * * * *

(3) discharges a firearm with reckless disregard for a risk of damage to property or a risk of physical inju-

ry to a person under circumstances other than those described in AS 11.61.195(a)(3)(A);

Alaska Stat. § 11.61.150(a)(1) (2014) provides:

(a) A person commits the crime of obstruction of highways if the person knowingly

(1) places, drops, or permits to drop on a highway any substance that creates a substantial risk of physical injury to others using the highway;

Alaska Stat. § 11.61.100(a) (2014) provides:

(a) A person commits the crime of riot if, while participating with five or more others, the person engages in tumultuous and violent conduct in a public place and thereby causes, or creates a substantial risk of causing, damage to property or physical injury to a person.

Alaska Stat. § 11.56.765(b)(1) (2014) provides:

(b) In a prosecution under this section, it is an affirmative defense that the defendant

(1) did not report in a timely manner because the defendant reasonably believed that doing so would have exposed the defendant or others to a substantial risk of physical injury;

Alaska Stat. § 11.61.195(a)(3)(A) (2014) provides in pertinent part:

(a) A person commits the crime of misconduct involving weapons in the second degree if the person knowingly

* * * * *

(3) discharges a firearm at or in the direction of

(A) a building with reckless disregard for a risk of physical injury to a person;

Alaska Stat. § 11.51.100(a)(1) (2014) provides:

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

Alaska Stat. § 11.41.250(a) (2014) provides:

(a) A person commits the crime of reckless endangerment if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Alaska Stat. § 11.41.300(a)(2)(B) (2014) provides in pertinent part:

(a) A person commits the crime of kidnapping if

* * * * *

(2) the person restrains another

* * * * *

(B) under circumstances which expose the restrained person to a substantial risk of serious physical injury.

Arizona

Ariz. Rev. Stat. Ann. § 13-1201(A) (2010) provides:

A. A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury.

Ariz. Rev. Stat. Ann. § 13-2508(A) (Supp. 2014) provides in pertinent part:

A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:

1. Using or threatening to use physical force against the peace officer or another.

2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

Arkansas

Ark. Code Ann. § 5-54-103(a) (2005) provides in pertinent part:

(a)(1) A person commits the offense of resisting arrest if he or she knowingly resists a person known by him or her to be a law enforcement officer effecting an arrest.

(2) As used in this subsection, "resists" means using or threatening to use physical force or any other means that creates a substantial risk of physical injury to any person.

Ark. Code Ann. § 5-11-103(a) (2013) provides:

(a) A person commits the offense of false imprisonment in the first degree if, without consent and without lawful authority, the person knowingly restrains another person so as to interfere substantially with the other person's liberty in a manner that exposes the other person to a substantial risk of serious physical injury.

Ark. Code Ann. § 5-13-205(a)(1) (2013) provides:

(a) A person commits assault in the first degree if he or she:

(1) Recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person;

Ark. Code Ann. § 5-27-201(a) (2013) provides:

(a) A person commits the offense of endangering the welfare of an incompetent person in the first degree if, being a parent, guardian, person legally charged with care or custody of an incompetent person, or a person charged with supervision of an incompetent person, he or she purposely:

(1) Engages in conduct creating a substantial risk of death or serious physical injury to an incompetent person; or

(2) Deserts the incompetent person under circumstances creating a substantial risk of death or serious physical injury.

Ark. Code Ann. § 5-27-205(a) (2013) provides:

(a) A person commits the offense of endangering the welfare of a minor in the first degree if, being a parent, guardian, person legally charged with care or custody of a minor, or a person charged with supervision of a minor, he or she purposely:

(1) Engages in conduct creating a substantial risk of death or serious physical injury to a minor; or

(2) Deserts a minor less than ten (10) years old under circumstances creating a substantial risk of death or serious physical injury.

Ark. Code Ann. § 5-38-302(a) (2013) provides in pertinent part:

(a) A person commits the offense of reckless burning if the person purposely starts a fire or causes an explosion, whether on his or her own property or property of another person, and thereby recklessly:

(1) Creates a substantial risk of death or serious physical injury to any person;

Ark. Code Ann. § 5-74-107(b)(1) (2005) provides:

(b)(1) A person commits unlawful discharge of a firearm from a vehicle in the second degree if he or she recklessly discharges a firearm from a vehicle in a manner that creates a substantial risk of physical injury to another person or property damage to a home, residence, or other occupiable structure.

Ark. Code Ann. § 5-26-307(a) (2013) provides:

(a) A person commits first degree assault on a family or household member if the person recklessly engages in conduct that creates a substantial risk of death or serious physical injury to a family or household member.

Ark. Code Ann. § 5-26-308(a) (2013) provides:

(a) A person commits second degree assault on a family or household member if the person recklessly engages in conduct that creates a substantial risk of physical injury to a family or household member.

Ark. Code Ann. § 5-13-206(a) (2013) provides:

(a) A person commits assault in the second degree if he or she recklessly engages in conduct that creates a substantial risk of physical injury to another person.

Ark. Code Ann. § 5-2-614(b) (2013) provides:

(b) When a person is justified under this subchapter in using physical force but he or she recklessly or negligently injures or creates a substantial risk of injury to a third party, the justification afforded by this subchapter is unavailable in a prosecution for the recklessness or negligence toward the third party.

Ark. Code Ann. § 5-54-201(1)(A) (Supp. 2013) provides:

(1) "Act of terrorism" means:

(A) Any act that causes or creates a risk of death or serious physical injury to five (5) or more persons;

Ark. Code Ann. § 5-38-301(a) (2013) provides in pertinent part:

(a) A person commits arson if he or she:

* * * * *

(C) Any property, whether his or her own or property of another person, if the act thereby negligently creates a risk of death or serious physical injury to any person;

California

Cal. Penal Code § 278.6(a)(1) (West 2014) provides:

(a) At the sentencing hearing following a conviction for a violation of Section 278 or 278.5, or both, the court shall consider any relevant factors and circumstances in aggravation, including, but not limited to, all of the following:

(1) The child was exposed to a substantial risk of physical injury or illness.

Cal. Penal Code § 11417(b) (West 2014) provides:

(b) The intentional release of a dangerous chemical or hazardous material generally utilized in an industrial or commercial process shall be considered use of a weapon of mass destruction when a person knowingly utilizes those agents with the intent to cause harm and the use places persons or animals at risk of serious injury, illness, or death, or endangers the environment.

Colorado

Colo. Rev. Stat. § 18-3-208 (2014) provides:

A person who recklessly engages in conduct which creates a substantial risk of serious bodily injury to another person commits reckless endangerment, which is a class 3 misdemeanor.

Colo. Rev. Stat. § 18-9-124(2)(a) (2014):

(2) As used in this section, unless the context otherwise requires:

(a) "Hazing" means any activity by which a person recklessly endangers the health or safety of or causes a risk of bodily injury to an individual for purposes of initiation or admission into or affiliation with any student organization; except that "hazing" does not include customary athletic events or other similar contests or com-petitions, or authorized training activities conducted by members of the armed forces of the state of Colorado or the United States.

Colo. Rev. Stat. § 18-9-115(1)(a) (2014) provides:

(1) A person commits endangering public transportation if such person:

(a) Tampers with a facility of public transportation with intent to cause any damage, malfunction, nonfunction, theft, or unauthorized removal of material which would result in the creation of a substantial risk of death or serious bodily injury to anyone;

Colo. Rev. Stat. § 18-8-103(1)(b) (2014) provides:

(1) A person commits resisting arrest if he knowingly prevents or attempts to prevent a peace officer, acting under color of his official authority, from effecting an arrest of the actor or another, by:

* * * * *

(b) Using any other means which creates a substantial risk of causing bodily injury to the peace officer or another.

Connecticut

Conn. Gen. Stat. Ann. § 53a-95(a) (West 2012) provides:

(a) A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury.

Conn. Gen. Stat. Ann. § 53a-111(a) (West 2012) provides in pertinent part:

(a) A person is guilty of arson in the first degree when, with intent to destroy or damage a building, as defined in section 53a-100, he starts a fire or causes an explosion, and * * * (4) at the scene of such fire or explosion a peace officer or firefighter is subjected to a substantial risk of bodily injury.

Conn. Gen. Stat. Ann. § 53a-112(a) (West 2012) provides in pertinent part:

(a) A person is guilty of arson in the second degree when, with intent to destroy or damage a building, as defined in section 53a-100, (1) he starts a fire or causes an explosion and (A) such act subjects another person to a substantial risk of bodily injury;

Conn. Gen. Stat. Ann. § 53a-63(a) (West 2012) provides:

(a) A person is guilty of reckless endangerment in the first degree when, with extreme indifference to human life, he recklessly engages in conduct which creates a risk of serious physical injury to another person.

Conn. Gen. Stat. Ann. § 53a-64(a) (West 2012) provides:

(a) A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a risk of physical injury to another person.

Conn. Gen. Stat. Ann. § 53a-254(a) (West 2012) provides:

(a) A person is guilty of computer crime in the third degree when he commits computer crime as defined in section 53a-251 and (1) the damage to or the value of the property or computer services exceeds one thousand dollars or (2) he recklessly engages in conduct which creates a risk of serious physical injury to another person.

Conn. Gen. Stat. Ann. § 53a-59(a)(3) (West 2012) provides:

(a) A person is guilty of assault in the first degree when: * * * (3) under circumstances evincing an extreme indifference to human life he recklessly

engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person;

Delaware

Del. Code Ann. tit. 11, § 603(a)(1) (2007) provides:

(a) A person is guilty of reckless endangering in the second degree when:

(1) The person recklessly engages in conduct which creates a substantial risk of physical injury to another person;

Del. Code Ann. tit. 11, § 782 (2007) provides in pertinent part:

* * * * *

A person is guilty of unlawful imprisonment in the first degree when the person knowingly and unlawfully restrains another person under circumstances which expose that person to the risk of serious physical injury.

Del. Code Ann. tit. 11, § 939(c) (Supp. 2014) provides in pertinent part:

(c) A person committing any of the crimes described in §§ 932-938 of this title is guilty in the third degree when:

* * * * *

(2) That person engages in conduct which creates a risk of serious physical injury to another person.

Del. Code Ann. tit. 11, § 835(b)(2)(a) (2007) provides:

(2) Carjacking in the second degree is a class D felony if the elements of subsection (a) of this section are met and if, while in possession or control of the vehicle, the person:

a. Recklessly engages in conduct which creates a substantial risk of death or serious physical injury to another person;

Del. Code Ann. tit. 11, § 613(a)(3) (2007) provides:

(a) A person is guilty of assault in the first degree when:

* * * * *

(3) The person recklessly engages in conduct which creates a substantial risk of death to another person, and thereby causes serious physical injury to another person;

District of Columbia

D.C. Code § 22-1101 (LexisNexis Supp. 2014) provides in pertinent part:

(a) A person commits the crime of cruelty to children in the first degree if that person intentionally, knowingly, or recklessly tortures, beats, or otherwise

willfully maltreats a child under 18 years of age or engages in conduct which creates a grave risk of bodily injury to a child, and thereby causes bodily injury.

(b) A person commits the crime of cruelty to children in the second degree if that person intentionally, knowingly, or recklessly:

(1) Maltreats a child or engages in conduct which causes a grave risk of bodily injury to a child;

D.C. Code § 22-404.01(a)(2) (LexisNexis Supp. 2014) provides:

(a) A person commits the offense of aggravated assault if:

* * * * *

(2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.

D.C. Code § 22-404.03(a)(2) (LexisNexis Supp. 2014) provides:

(a) A person commits the offense of aggravated assault on a public vehicle inspection officer if that person assaults, impedes, intimidates, or interferes with a public vehicle inspection officer while that officer is engaged in or on account of the performance of his or her official duties, and:

* * * * *

(2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.

D.C. Code § 22-405(c) (LexisNexis Supp. 2014) provides:

(c) A person who violates subsection (b) of this section and causes significant bodily injury to the law enforcement officer, or commits a violent act that creates a grave risk of causing significant bodily injury to the officer, shall be guilty of a felony and, upon conviction, shall be imprisoned not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both.

Florida

Fla. Stat. Ann. § 827.03(1)(e) (West Supp. 2015) provides in pertinent part:

* * * * *

Except as otherwise provided in this section, neglect of a child may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or mental injury, or a substantial risk of death, to a child.

Fla. Stat. Ann. § 825.102(3)(a)(2) (West Supp. 2015) provides in pertinent part:

* * * * *

Neglect of an elderly person or disabled adult may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or psychological injury, or a substantial risk of death, to an elderly person or disabled adult.

Hawaii

Haw. Rev. Stat. Ann. § 703-309 (LexisNexis Supp. 2014) provides in pertinent part:

The use of force upon or toward the person of another is justifiable under the following circumstances:

(1) The actor is the parent, guardian, or other person similarly responsible for the general care and supervision of a minor, or a person acting at the request of the parent, guardian, or other responsible person, and:

* * * * *

(b) The force used does not intentionally, knowingly, recklessly, or negligently create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

* * * * *

(3) The actor is the guardian or other person similarly responsible for the general care and supervision of an incompetent person, and:

* * * * *

(b) The force used is not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

* * * * *

(7) The actor is a person who is authorized or required by law to maintain order or decorum in a vehicle, train, or other carrier, or in a place where others are assembled, and:

* * * * *

(b) The force used is not designed to cause or known to create a substantial risk of causing death, bodily injury or extreme mental distress.

Haw. Rev. Stat. Ann. § 703-308(1) (LexisNexis 2007) provides in pertinent part:

(1) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent the other person from committing suicide, inflicting serious bodily harm upon himself, committing or consummating the commission of a crime involving or threatening bodily injury, damage to or loss of property, or breach of the peace, except that:

* * * * *

(b) The use of deadly force is not in any event justifiable under this section unless:

(i) The actor believes that there is a substantial risk that the person whom the actor seeks to prevent from committing a crime will cause death or serious bodily injury to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons;

Haw. Rev. Stat. Ann. § 707-721(1) (LexisNexis Supp. 2014) provides:

(1) A person commits the offense of unlawful imprisonment in the first degree if the person knowingly restrains another person under circumstances which expose the person to the risk of serious bodily injury.

Haw. Rev. Ann. Stat. § 703-307(3) (LexisNexis 2007) provides in pertinent part:

(3) The use of deadly force is not justifiable under this section unless:

* * * * *

(c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and

Haw. Rev. Stat. Ann. § 703-310(2) (LexisNexis 2007) provides:

(2) When the actor is justified under sections 703-303 to 703-309 in using force upon or toward the person of another but the actor recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence toward innocent persons.

Haw. Rev. Stat. Ann. § 710-1026(1)(b) (LexisNexis 2007) provides:

(1) A person commits the offense of resisting arrest if the person intentionally prevents a law enforcement officer acting under color of the law enforcement officer's official authority from effecting an arrest by:

* * * * *

(b) Using any other means creating a substantial risk of causing bodily injury to the law enforcement officer or another.

Haw. Rev. Stat. Ann. § 703-306(4)(a) (LexisNexis 2007) provides:

(4) The justification afforded by this section extends to the use of a device for the purpose of protecting property only if:

(a) The device is not designed to cause or known to create a substantial risk of causing death or serious bodily injury;

Illinois

720 Ill. Comp. Stat. Ann. 5/12-5.3(a) (West Supp. 2014) provides:

(a) A person commits use of a dangerous place for the commission of a controlled substance or cannabis offense when that person knowingly exercises control over any place with the intent to use that place to manufacture, produce, deliver, or possess with intent to deliver a controlled or counterfeit substance or controlled substance analog in violation of Section 401 of the Illinois Controlled Substances Act or to manufacture, produce, deliver, or possess with intent to deliver cannabis in violation of Section 5, 5.1, 5.2, 7, or 8 of the Cannabis Control Act and:

(1) the place, by virtue of the presence of the substance or substances used or intended to be used to manufacture a controlled or counterfeit substance, controlled substance analog, or cannabis, presents a substantial risk of injury to any person from fire, explosion, or exposure to toxic or noxious chemicals or gas; or

(2) the place used or intended to be used to manufacture, produce, deliver, or possess with intent to deliver a controlled or counterfeit substance, controlled substance analog, or cannabis has located within it or surrounding it devices, weapons, chemicals, or explosives designed, hidden, or arranged in a manner that would cause a person to be exposed to a substantial risk of great bodily harm.

720 Ill. Comp. Stat. Ann. 5/29D-10(*l*)(1) (West Supp. 2014) provides:

(*l*) "Terrorist act" or "act of terrorism" means: (1) any act that is intended to cause or create a risk and does cause or create a risk of death or great bodily harm to one or more persons; * * *

Indiana

Ind. Code Ann. § 35-31.5-2-168(3) (LexisNexis Supp. 2012) provides:

(a) A person who recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person commits criminal recklessness.

Ind. Code Ann. § 35-42-1-4 (LexisNexis Supp. 2014) provides in pertinent part:

(b) A person who kills another human being while committing or attempting to commit:

(1) a Level 5 or Level 6 felony that inherently poses a risk of serious bodily injury;

(2) a Class A misdemeanor that inherently poses a risk of serious bodily injury; or

(3) battery;

commits involuntary manslaughter, a Level 5 felony.

Ind. Code Ann. § 35-42-2-1.5 (LexisNexis Supp. 2014) provides in pertinent part:

A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:

(1) serious permanent disfigurement;

(2) protracted loss or impairment of the function of a bodily member or organ; or

(3) the loss of a fetus;

commits aggravated battery, a Level 3 felony.

Ind. Code Ann. § 35-42-2-2.5(a) (LexisNexis Supp. 2014) provides:

(a) As used in this section, "hazing" means forcing or requiring another person:

(1) with or without the consent of the other person; and

(2) as a condition of association with a group or organization;

to perform an act that creates a substantial risk of bodily injury.

Ind. Code Ann. § 35-44.1-3-1(b) (LexisNexis Supp. 2014) provides in pertinent part:

(b) The offense under subsection (a) is a:

(1) Level 6 felony if:

* * * * *

(B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;

Ind. Code Ann. § 35-43-4-2(a)(2) (LexisNexis 2014) provides:

(a) A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class A misdemeanor. However, the offense is:

* * * * *

(2) a Level 5 felony if:

(A) the value of the property is at least fifty thousand dollars ($50,000); or

(B) the property that is the subject of the theft is a valuable metal (as defined in IC 25-37.5-1-1) and:

(i) relates to transportation safety;

(ii) relates to public safety; or

(iii) is taken from a hospital or other health care facility, telecommunications provider, public utility (as defined in IC 32-24-1-5.9(a)), or key facility;

and the absence of the property creates a substantial risk of bodily injury to a person.

Iowa

Iowa Code Ann. § 709.3(1)(a) (West 2003) provides:

1. A person commits sexual abuse in the second degree when the person commits sexual abuse under any of the following circumstances:

a. During the commission of sexual abuse the person displays in a threatening manner a dangerous weapon, or uses or threatens to use force creating a substantial risk of death or serious injury to any person.

Louisiana

La. Rev. Stat. Ann. § 14:2(B) (Supp. 2015) provides in pertinent part:

B. In this Code, "crime of violence" means an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon.

Kansas

Kan. Stat. Ann. § 21-5812(c)(2)(A) (Supp. 2013) provides:

(2) Aggravated arson as defined in:

(A) Subsection (b)(1) is a:

(i) Severity level 3, person felony, if such crime results in a substantial risk of bodily harm; and

(ii) severity level 6, person felony, if such crime results in no substantial risk of bodily harm;

Kan. Stat. Ann. § 21-5406(a) (Supp. 2013) provides:

(a) Vehicular homicide is the killing of a human being committed by the operation of an automobile, airplane, motor boat or other motor vehicle in a manner which creates an unreasonable risk of injury to the person or property of another and which constitutes a material deviation from the standard of care which a reasonable person would observe under the same circumstances.

Kan. Stat. Ann. § 21-5817(b) (Supp. 2013) provides:

(b) Aggravated tampering with a traffic signal is tampering with a traffic signal as defined in subsection (a) which creates an unreasonable risk of an accident causing the death or great bodily injury of any person.

Maine

Me. Rev. Stat. tit. Ann. 17-A, § 554(1)(B-2) (2006) provides:

1. A person is guilty of endangering the welfare of a child if that person:

* * * * *

B-2. Being a parent, foster parent, guardian or other person responsible for the long-term general care and welfare of a child under 16, recklessly fails to take reasonable measures to protect the child from the risk of further bodily injury after knowing:

(1) That the child had, in fact, sustained serious bodily injury or bodily injury under circumstances posing a substantial risk of serious bodily injury; and

(2) That such bodily injury was, in fact, caused by the unlawful use of physical force by another person;

Me. Rev. Stat. Ann. tit. 17-A, § 213(1) (2006) provides:

A person is guilty of aggravated reckless conduct if the person with terroristic intent engages in conduct that in fact creates a substantial risk of serious bodily injury to another person.

Me. Rev. Stat. Ann. tit. 17-A, § 751-B(1)(C) (Supp. 2014) provides:

1. A person is guilty of refusing to submit to arrest or detention if, with the intent to hinder, delay or prevent a law enforcement officer from effecting the arrest or detention of that person, the person:

* * * * *

C. Creates a substantial risk of bodily injury to the law enforcement officer. Violation of this paragraph is a Class D crime.

Me. Rev. Stat. Ann. tit. 17-A, § 211(1) (2006) provides:

1. A person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person.

Me. Rev. Stat. Ann. tit. 17-A, § 101(3) (Supp. 2014) provides in pertinent part:

3. Conduct that is justifiable under this chapter constitutes a defense to any crime; except that, if a person is justified in using force against another, but the person recklessly injures or creates a risk of injury to 3rd persons, the justification afforded by this chapter is unavailable in a prosecution for such recklessness.

Me. Rev. Stat. Ann. tit. 17-A, § 301(1)(B) (Supp. 2014) provides:

1. A person is guilty of kidnapping if either:

* * * * *

B. The actor knowingly restrains another person:

(1) Under circumstances which in fact expose the other person to risk of serious bodily injury;

Maryland

Md. Code Ann., Crim. Law § 3-602.1(a)(5)(i) (LexisNexis 2012) provides:

(5)(i) "Neglect" means the intentional failure to provide necessary assistance and resources for the physical needs or mental health of a minor that creates a substantial risk of harm to the minor's physical health or a substantial risk of mental injury to the minor.

Md. Code Ann., Crim. Law § 3-204(a) (LexisNexis 2012) provides:

(a) *Prohibited.*—A person may not recklessly:

(1) engage in conduct that creates a substantial risk of death or serious physical injury to another; or

(2) discharge a firearm from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury to another.

Md. Code Ann., Crim. Law § 3-1001(c) (LexisNexis Supp. 2014) provides:

(c) *In general.*—A person may not knowingly threaten to commit or threaten to cause to be committed a crime of violence, as defined in § 14-101 of this article, that would place others at substantial risk of death or serious physical injury, as defined in § 3-201 of this title, if as a result of the threat, regardless of whether the threat is carried out, five or more people are:

(1) placed in reasonable fear that the crime will be committed;

(2) evacuated from a dwelling, storehouse, or public place;

(3) required to move to a designated area within a dwelling, storehouse, or public place; or

(4) required to remain in a designated safe area within a dwelling, storehouse, or public place.

Md. Code Ann., Crim. Law § 3-607(a) (LexisNexis 2012) provides:

(a) *Prohibited.*—A person may not recklessly or intentionally do an act or create a situation that subjects a student to the risk of serious bodily injury for the purpose of an initiation into a student organization of a school, college, or university.

Massachusetts

Mass. Ann. Laws ch. 140, § 121 (LexisNexis 2007) provides in pertinent part:

"Violent crime", shall mean any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult, that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another.

Mass. Ann. Laws ch. 265, § 13L (LexisNexis 2010) provides in pertinent part:

Whoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act shall be punished by imprisonment in the house of correction for not more than 2 ½ years.

For the purposes of this section, such wanton or reckless behavior occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child. The risk must be of such nature and

degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Mass. Ann. Laws ch. 268, § 32B(a) (LexisNexis 2010) provides:

(a) A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or an-other, by:

(1) using or threatening to use physical force or violence against the police officer or another; or

(2) using any other means which creates a substantial risk of causing bodily injury to such police officer or another.

Michigan

Mich. Comp. Laws Ann. § 752.581 (West 2004) provides:

Sec. 1. A person is guilty of a misdemeanor, punishable by a fine of not more than $500.00, or by incarceration in the county jail for not more than 30 days, or both:

(a) When the chief administrative officer of a publicly owned and operated institution of higher education, or his designee, notifies the person that he is such officer or designee and that the person is in violation of the properly promulgated rules of the institution; and

(b) When the person is in fact in violation of such rules; and

(c) When, thereafter, such officer or designee directs the person to vacate the premises, building or other structure of the institution; and

(d) When the person thereafter willfully remains in or on such premises, building or other structure; and

(e) When, in so remaining therein or thereon, the person constitutes (1) a clear and substantial risk of physical harm or injury to other persons or of damage to or destruction of the property of the institution, or (2) an unreasonable prevention or disruption of the customary and lawful functions of the institution, by occupying space necessary therefor or by use of force or by threat of force.

Mich. Comp. Laws Ann. § 752.582 (West 2004) provides in pertinent part:

Sec. 2. A person is guilty of a misdemeanor, punishable by a fine of not less than $200.00 and not more than $1,000.00, or by incarceration in the county jail for not more than 90 days, or both, who enters on the premises, building or other structure of a publicly owned and operated institution of higher education, with the intention to, and therein or thereon does in fact, constitute (a) a clear and substantial risk of physical harm or injury to other persons or of damage to or destruction of the property of the institution * * * .

Minnesota

Minn. Stat. Ann. § 609.595(1) (West 2009) provides:

Subdivision 1. Criminal damage to property in the first degree. Whoever intentionally causes damage to physical property of another without the latter's consent may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both, if:

(1) the damage to the property caused a reasonably foreseeable risk of bodily harm;

Minn. Stat. Ann. § 609.52 (West 2009) provides in pertinent part:

Subd. 3a. Enhanced penalty. If a violation of this section creates a reasonably foreseeable risk of bodily harm to another, the penalties described in subdivision 3 are enhanced as follows:

Minn. Stat. Ann. § 609.50 (West 2009) provides in pertinent part:

Subd. 2. Penalty. A person convicted of violating subdivision 1 may be sentenced as follows:

(1) if (i) the person knew or had reason to know that the act created a risk of death, substantial bodily harm, or serious property damage; or (ii) the act caused death, substantial bodily harm, or serious property damage; to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both;

Minn. Stat. Ann. § 609.851 (West 2009) provides in pertinent part:

Subd. 2. Felony. A person who violates subdivision 1 and knows that doing so creates a risk of death or bodily harm or serious property damage is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Minn. Stat. Ann. § 609.396 (West 2009) provides in pertinent part:

Subd. 2. Felony. A person is guilty of a felony and may be sentenced to not more than five years imprisonment or to payment of a fine of not more than $10,000, or both, if:

(1) the person intentionally enters or is present in an area at the Camp Ripley Military Reservation that is posted by order of the adjutant general as restricted for weapon firing or other hazardous military activity; and

(2) the person knows that doing so creates a risk of death, bodily harm, or serious property damage.

Minn. Stat. Ann. § 609.2325 (West 2009) provides in pertinent part:

Subdivision 1. Crimes. (a) A caregiver who, with intent to produce physical or mental pain or injury to a vulnerable adult, subjects a vulnerable adult to any aversive or deprivation procedure, unreasonable confinement, or involuntary seclusion, is guilty of criminal

abuse and may be sentenced as provided in subdivision 3.

* * * * *

Subd. 3. Penalties. (a) A person who violates subdivision 1, paragraph (a), may be sentenced as follows:

* * * * *

(3) if the act results in substantial bodily harm or the risk of death, imprisonment for not more than five years or payment of a fine of not more than $10,000, or both;

Minn. Stat. Ann. § 609.662 (West 2009) provides in pertinent part:

Subd. 4. Defense. It is an affirmative defense to a charge under this section if the defendant proves by a preponderance of the evidence that the defendant failed to investigate or render assistance as required under this section because the defendant reasonably perceived that these actions could not be taken without a significant risk of bodily harm to the defendant or others.

Mississippi

Miss. Code. Ann. § 97-3-105 (West 2011) provides in pertinent part:

(1) A person is guilty of hazing in the first degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a sub-

stantial risk of physical injury to such other person or a third person and thereby causes such injury.

* * * * *

(3) A person is guilty of hazing in the second degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person.

Missouri

Mo. Ann. Stat. § 565.120(1) (West 2012) provides:

1. A person commits the crime of felonious restraint if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty and exposes him to a substantial risk of serious physical injury.

Mo. Ann. Stat. § 578.360(2) (West Supp. 2015) provides in pertinent part:

As used in sections 578.360 to 578.365, unless the context clearly requires otherwise, the following terms mean:

* * * * *

(2) **"Hazing"**, a willful act, occurring on or off the campus of an educational institution, directed against a student or a prospective member of an organization operating under the sanction of an educational institu-

tion, that recklessly endangers the mental or physical health or safety of a student or prospective member for the purpose of initiation or admission into or continued membership in any such organization to the extent that such person is knowingly placed at probable risk of the loss of life or probable bodily or psychological harm.

Mo. Ann. Stat. § 578.365(1) (West Supp. 2015) provides:

(1) A person commits the offense of hazing if he or she knowingly participates in or causes a willful act, occurring on or off the campus of a public or private college or university, directed against a student or a prospective member of an organization operating under the sanction of a public or private college or university, that recklessly endangers the mental or physical health or safety of a student or prospective member for the purpose of initiation or admission into or continued membership in any such organization to the extent that such person is knowingly placed at probable risk of the loss of life or probable bodily or psychological harm.

Mo. Ann. Stat. § 575.150 (West Supp. 2015) provides:

Resisting an arrest, detention or stop by fleeing in such a manner that the person fleeing creates a substantial risk of serious physical injury or death to any person is a class D felony; otherwise, resisting or interfering with an arrest, detention or stop in violation

of subdivision (1) or (2) of subsection 1 of this section is a class A misdemeanor.

Mo. Ann. Stat. § 565.075 (West 2012) provides in pertinent part:

A person commits the crime of assault while on school property if the person:

* * * * *

(3) Recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person; and the act de-scribed under subdivision (1), (2) or (3) of this subsection occurred on school or school district property, or in a vehicle that at the time of the act was in the service of a school or school district, or arose as a result of a school or school district-sponsored activity.

Mo. Ann. Stat. § 577.070 (West Supp. 2015) provides in pertinent part:

The offense of littering is a class C misdemeanor unless:

(1) Such littering creates a substantial risk of physical injury or property damage to another;

Mo. Ann. Stat. § 565.056(1)(4) (West Supp. 2015) provides:

1. A person commits the offense of assault in the fourth degree if:

* * * * *

(4) The person recklessly engages in conduct which creates a substantial risk of death or serious physical injury to another person;

Mo. Ann. Stat. § 565.074(1)(4) (West 2012) provides:

1. A person commits the crime of domestic assault in the third degree if the act involves a family or household member, including any child who is a member of the family or household, as defined in section 455.010 and:

* * * * *

(4) The person recklessly engages in conduct which creates a grave risk of death or serious physical injury to such family or household member;

Mo. Ann. Stat. § 565.082(1)(7) (West 2012) provides:

1. A person commits the crime of assault of a law enforcement officer, corrections officer, emergency personnel, highway worker in a construction zone or work zone, utility worker, cable worker, or probation and parole officer in the second degree if such person:

* * * * *

(7) Acts with criminal negligence to create a substantial risk of death or serious physical injury to a law enforcement officer, corrections officer, emergency personnel, highway worker in a construction zone or work zone, utility worker, cable worker, or probation and parole officer.

Montana

Mont. Code Ann. § 45-5-207(1) (2013) provides:

(1) A person who knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of criminal endangerment. This conduct includes but is not limited to knowingly placing in a tree, log, or any other wood any steel, iron, ceramic, or other substance for the purpose of damaging a saw or other wood harvesting, processing, or manufacturing equipment.

Mont. Code Ann. § 45-9-132(3)(a) (2013) provides:

(3) A person convicted of operation of an unlawful clandestine laboratory shall be fined an amount not to exceed $50,000, be imprisoned in a state prison for a term not to exceed 50 years, or both, if 46-1-401 is complied with and the operation of an unlawful clandestine laboratory or any phase of the operation:

(a) created a substantial risk of death of or serious bodily injury to another;

Mont. Code Ann. § 45-7-301(1)(b) (2013) provides:

(1) A person commits the offense of resisting arrest if the person knowingly prevents or attempts to prevent a peace officer from effecting an arrest by:

* * * * *

(b) using any other means that creates a risk of causing physical injury to the peace officer or another.

Mont. Code Ann. § 45-5-208(1) (2013) provides:

(1) A person who negligently engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of negligent endangerment.

Mont. Code Ann. § 45-5-628(1) (2013) provides:

(1) A person commits the offense of criminal child endangerment if the person purposely, knowingly, or negligently causes substantial risk of death or serious bodily injury to a child under 14 years of age by:

(a) failing to seek reasonable medical care for a child suffering from an apparent acute life-threatening condition;

(b) placing a child in the physical custody of another who the person knows has previously purposely or knowingly caused bodily injury to a child;

(c) placing a child in the physical custody of another who the person knows has previously committed an offense against the child under 45-5-502 or 45-5-503;

(d) manufacturing or distributing dangerous drugs in a place where a child is present;

(e) operating a motor vehicle under the influence of alcohol or dangerous drugs in violation of 61-8-401, 61-8-406, 61-8-410, or 61-8-465 with a child in the vehicle; or

(f) failing to attempt to provide proper nutrition for a child, resulting in a medical diagnosis of nonorganic failure to thrive.

Nebraska

Neb. Rev. Stat. Ann. § 28-1412(3) (LexisNexis 2009) provides:

(3) The use of deadly force is not justifiable under this section unless:

(a) The arrest is for a felony;

(b) Such person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer;

(c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(d) The actor believes that:

(i) The crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(ii) There is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Neb. Rev. Stat. Ann. § 28-314(1) (LexisNexis 2009) provides:

(1) A person commits false imprisonment in the first degree if he or she knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury; or (b) with intent to hold him or her in a condition of involuntary servitude.

Neb. Rev. Stat. Ann. § 28-1414(3) (LexisNexis 2009) provides:

(3) When the actor is justified under sections 28-1408 to 28-1413 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

Neb. Rev. Stat. Ann. § 28-904(1)(b) (LexisNexis 2009) provides:

(1) A person commits the offense of resisting arrest if, while intentionally preventing or attempting to prevent a peace officer, acting under color of his or her official authority, from effecting an arrest of the actor or another, he or she:

* * * * *

(b) Uses any other means which creates a substantial risk of causing physical injury to the peace officer or another;

Nevada

Nev. Rev. Stat. Ann. § 200.408 (LexisNexis 2012) provides:

1. A person who causes to be administered to another person any controlled substance without that person's knowledge and with the intent thereby to enable or assist himself or herself or any other person

to commit a crime of violence against that person or the property of that person, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years.

2. As used in this section:

(a) "Controlled substance" includes flunitrazepam and gamma-hydroxybutyrate and each substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor as defined in NRS 453.086.

(b) "Crime of violence" means:

(1) Any offense involving the use or threatened use of force or violence against the person or property of another; or

(2) Any felony for which there is a substantial risk that force or violence may be used against the person or property of another in the commission of the felony.

(c) "Without a person's knowledge" means the person is unaware that a substance that can alter the person's ability to appraise conduct or to decline participation in or communicate an unwillingness to participate in conduct has been administered to the person.

Nev. Rev. Stat. Ann. § 200.575(3) (LexisNexis 2012) provides:

(3) A person who commits the crime of stalking with the use of an Internet or network site, electronic mail, text messaging or any other similar means of communication to publish, display or distribute information in a manner that substantially increases the risk of harm or violence to the victim shall be punished for a category C felony as provided in NRS 193.130.

New Hampshire

N.H. Rev. Stat. Ann. § 633:2(I) (2007) provides:

(I) A person is guilty of a class B felony if he knowingly confines another unlawfully in circumstances exposing him to risk of serious bodily injury.

N.H. Rev. Stat. Ann. § 638:18(II)(b) (Supp. 2014) provides:

(II) Computer crime constitutes a class B felony if:

* * * * *

(b) The person recklessly engages in conduct which creates a risk of serious physical injury to another person;

New Jersey

N.J. Stat. Ann. § 2C:20-10(c) (West 2005) provides:

(c) A person commits a crime of the third degree if, with purpose to withhold temporarily from the owner, he takes, operates or exercises control over a motor vehicle without the consent of the owner or other person authorized to give consent and operates the motor vehicle in a manner that creates a risk of injury to any person or a risk of damage to property.

N.J. Stat. Ann. § 2C:3-7 (West 2005) provides in pertinent part:

The use of deadly force is not justifiable under this section unless:

(a) The actor effecting the arrest is authorized to act as a peace officer or has been summoned by and is assisting a person whom he reasonably believes to be authorized to act as a peace officer; and

(b) The actor reasonably believes that the force employed creates no substantial risk of injury to innocent persons; and

(c) The actor reasonably believes that the crime for which the arrest is made was homicide, kidnapping, an offense under 2C:14-2 or 2C:14-3, arson, robbery, burglary of a dwelling, or an attempt to commit one of these crimes;

N.J. Stat. Ann. § 2C:29-2(a)(1) (West Supp. 2014) provides in pertinent part:

a. (1) Except as provided in paragraph (3), a person is guilty of a disorderly persons offense if he purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest. (2) Except as provided in paragraph (3), a person is guilty of a crime of the fourth degree if he, by flight, purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest. (3) An offense under paragraph (1) or (2) of subsection a. is a crime of the third degree if the person:

(a) Uses or threatens to use physical force or violence against the law enforcement officer or another; or

(b) Uses any other means to create a substantial risk of causing physical injury to the public servant or another.

N.J. Stat. Ann. § 2C:13-2(a) (West 2005) provides:

A person commits a crime of the third degree if he knowingly:

a. Restrains another unlawfully in circumstances exposing the other to risk of serious bodily injury;

N.J. Stat. Ann. § 2C:40-20 (West 2005) provides:

A person who uses any type of device, including but not limited to wire or cable, that is not a fence but is installed at a height under 10 feet from the ground, to

indicate boundary lines or otherwise to divide, partition or segregate portions of real property, if the device is not readily visible or marked in such a way as to make it readily visible to persons who are pedestrians, equestrians, bicyclists or drivers of off-the-road vehicles and poses a risk of causing significant bodily injury to such persons, shall be guilty of a crime of the fourth degree. However, this section is not intended to apply to markers set by a licensed land surveyor, pursuant to existing statute.

N.J. Stat. Ann. § 2C:3-9(c) (West 2005) provides:

(c) When the actor is justified under sections 2C:3-3 to 2C:3-8 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such reckless-ness or negligence towards innocent persons.

N.J. Stat. Ann. § 2C:17-2(c) (West 2005) provides:

(c) A person who recklessly creates a risk of widespread injury or damage commits a crime of the fourth degree, even if no such injury or damage occurs. A violation of this subsection is a crime of the third degree if the risk of widespread injury or damage results from the reckless handling or storage of hazardous materials. A violation of this subsection is a crime of the second degree if the handling or storage of hazardous materials violated any law, rule or regulation intended to protect the public health and safety.

N.J. Stat. Ann. § 2C:33-14(d) (West Supp. 2014) provides:

(d) Interference with transportation is a crime of the third degree if the person purposely, knowingly or recklessly causes significant bodily injury to another person or causes pecuniary loss of $2,000 or more, or if the person purposely or knowingly creates a risk of significant bodily injury to another person.

New York

N.Y. Penal Law § 135.10 (McKinney 2009) provides:

A person is guilty of unlawful imprisonment in the first degree when he restrains another person under circumstances which expose the latter to a risk of serious physical injury.

N.Y. Penal Law § 125.25(4) (McKinney 2009) provides:

A person is guilty of murder in the second degree when:

* * * * *

4. Under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person;

N.Y. Penal Law § 120.20 (McKinney 2009) provides:

A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

N.Y. Penal Law § 120.16 (McKinney 2009) provides:

A person is guilty of hazing in the first degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person and thereby causes such injury.

N.Y. Penal Law § 120.17 (McKinney 2009) provides:

A person is guilty of hazing in the second degree when, in the course of another person's initiation or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person.

N.Y. Penal Law § 156.26 (McKinney 2010) provides in pertinent part:

A person is guilty of computer tampering in the second degree when he or she commits the crime of computer tampering in the fourth degree and he or she intentionally alters in any manner or destroys:

* * * * *

2. computer material that contains records of the medical history or medical treatment of an identified or readily identifiable individual or individuals and as a result of such alteration or destruction, such individual or individuals suffer serious physical injury, and he or she is aware of and consciously disregards a substantial and unjustifiable risk that such serious physical injury may occur.

N.Y. Penal Law § 490.47 (McKinney 2008) provides:

A person is guilty of criminal use of a chemical weapon or biological weapon in the third degree when, under circumstances evincing a depraved indifference to human life, he or she uses, deploys, releases, or causes to be used, deployed, or released any select chemical agent or select biological agent, and thereby creates a grave risk of death or serious physical injury to another person not a participant in the crime.

N.Y. Penal Law § 125.20 (McKinney 2009) provides in pertinent part:

A person is guilty of manslaughter in the first degree when:

* * * * *

4. Being eighteen years old or more and with intent to cause physical injury to a person less than eleven years old, the defendant recklessly engages in conduct which creates a grave risk of serious physical injury to such person and thereby causes the death of such person.

North Carolina

N.C. Gen. Stat. § 14-318.2(a) (2013) provides:

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

North Dakota

N.D. Cent. Code § 12.1-17-03 (2012) provides:

A person is guilty of an offense if he creates a substantial risk of serious bodily injury or death to another. The offense is a class C felony if the circumstances manifest his extreme indifference to the value of human life. Otherwise it is a class A misdemeanor. There is risk within the meaning of this section if the potential for harm exists, whether or not a particular person's safety is actually jeopardized.

N.D. Cent. Code § 12.1-17-10 (2012) provides:

A person is guilty of an offense when, in the course of another person's initiation into or affiliation with any organization, the person willfully engages in conduct that creates a substantial risk of physical injury to that other person or a third person. As used in this section, "conduct" means any treatment or forced physical activity that is likely to adversely affect the

physical health or safety of that other person or a third person, or which subjects that other person or third person to extreme mental stress, and may include extended deprivation of sleep or rest or extended isolation, whipping, beating, branding, forced calisthenics, overexposure to the weather, and forced consumption of any food, liquor, beverage, drug, or other substance. The offense is a class A misdemeanor if the actor's conduct causes physical injury, otherwise the offense is a class B misdemeanor.

N.D. Cent. Code § 12.1-05-01(2) (2012) provides:

If a person is justified or excused in using force against another, but he recklessly or negligently injures or creates a risk of injury to other persons, the justifications afforded by this chapter are unavailable in a prosecution for such recklessness or negligence.

N.D. Cent. Code § 12.1-08-02(1) (2012) provides:

A person is guilty of a class A misdemeanor if, with intent to prevent a public servant from effecting an arrest of himself or another for a misdemeanor or infraction, or from discharging any other official duty, he creates a substantial risk of bodily injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to effecting the arrest or the discharge of the duty. A person is guilty of a class C felony if, with intent to prevent a public servant from effecting an arrest of himself or another for a class A, B, or C felony, he creates a substantial risk of bodily

injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to effecting such an arrest.

N.D. Cent. Code § 12.1-18-02 (2012) provides in pertinent part:

A person is guilty of a class C felony, if he:

* * * * *

2. Knowingly restrains another under terrorizing circumstances or under circumstances exposing him to risk of serious bodily injury;

Ohio

Ohio Rev. Code Ann. § 2921.331(C)(5)(a) (LexisNexis 2014) provides in pertinent part:

* * * * *

(5)(a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

* * * * *

(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

Ohio Rev. Code Ann. § 2919.22(B)(3) provides:

(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

* * * * *

(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;

Ohio Rev. Code Ann. § 2901.01(9) (LexisNexis 2014) provides in pertinent part:

(9) "Offense of violence" means any of the following:

* * * * *

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons.

Ohio Rev. Code Ann. § 2909.02(A) (LexisNexis 2014) provides:

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

(1) Create a substantial risk of serious physical harm to any person other than the offender;

(2) Cause physical harm to any occupied structure;

(3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure.

Ohio Rev. Code Ann. § 2905.01(B) (LexisNexis 2014) provides:

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

(1) Remove another from the place where the other person is found;

(2) Restrain another of the other person's liberty.

Ohio Rev. Code Ann. § 2905.02(A)(2) (LexisNexis 2014) provides:

(A) No person, without privilege to do so, shall knowingly do any of the following:

* * * * *

(2) By force or threat, restrain the liberty of another person under circumstances that create a risk of

physical harm to the victim or place the other person in fear;

Ohio Rev. Code Ann. § 2909.08 (LexisNexis 2014) provides in pertinent part:

* * * * *

(D) Whoever violates division (B) of this section is guilty of endangering aircraft, a misdemeanor of the first degree. If the violation creates a risk of physical harm to any person, endangering aircraft is a felony of the fifth degree. If the violation creates a substantial risk of physical harm to any person or if the aircraft that is the subject of the violation is occupied, endangering aircraft is a felony of the fourth degree.

(E) Whoever violates division (C) of this section is guilty of endangering airport operations, a misdemeanor of the second degree. If the violation creates a risk of physical harm to any person, endangering airport operations is a felony of the fifth degree. If the violation creates a substantial risk of physical harm to any person, endangering airport operations is a felony of the fourth degree. In addition to any other penalty or sanction imposed for the violation, the hunting license or permit of a person who violates division (C) of this section while hunting shall be suspended or revoked pursuant to section 1533.68 of the Revised Code.

Ohio Rev. Code Ann. § 2909.07(C) (LexisNexis 2014) provides:

(1) Whoever violates this section is guilty of criminal mischief, and shall be punished as provided in division (C)(2) or (3) of this section.

(2) Except as otherwise provided in this division, criminal mischief committed in violation of division (A)(1), (2), (3), (4), or (5) of this section is a misdemeanor of the third degree. Except as otherwise provided in this division, if the violation of division (A)(1), (2), (3), (4), or (5) of this section creates a risk of physical harm to any person, criminal mischief committed in violation of division (A)(1), (2), (3), (4), or (5) of this section is a misdemeanor of the first degree. If the property involved in the violation of division (A)(1), (2), (3), (4), or (5) of this section is an aircraft, an aircraft engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid, any other equipment, implement, or material used or intended to be used in the operation of an air-craft, or any cargo carried or intended to be carried in an air-craft, criminal mischief committed in violation of division (A)(1), (2), (3), (4), or (5) of this section is one of the following:

(a) If the violation creates a risk of physical harm to any person, except as otherwise provided in division (C)(2)(b) of this section, criminal mischief committed in violation of division (A)(1), (2), (3), (4), or (5) of this section is a felony of the fifth degree.

(b) If the violation creates a substantial risk of physical harm to any person or if the property involved in a violation of this section is an occupied aircraft,

criminal mischief committed in violation of division (A)(1), (2), (3), (4), or (5) of this section is a felony of the fourth degree.

(3) Except as otherwise provided in this division, criminal mischief committed in violation of division (A)(6) of this section is a misdemeanor of the first degree. Except as otherwise provided in this division, if the value of the computer, computer system, computer network, computer software, computer program, or data involved in the violation of division (A)(6) of this section or the loss to the victim resulting from the violation is one thousand dollars or more and less than ten thousand dollars, or if the computer, computer system, computer network, computer software, computer program, or data involved in the violation of division (A)(6) of this section is used or intended to be used in the operation of an aircraft and the violation creates a risk of physical harm to any person, criminal mischief committed in violation of division (A)(6) of this section is a felony of the fifth degree. If the value of the computer, computer system, computer network, computer software, computer program, or data involved in the violation of division (A)(6) of this section or the loss to the victim resulting from the violation is ten thousand dollars or more, or if the computer, computer system, computer network, computer software, computer program, or data involved in the violation of division (A)(6) of this section is used or intended to be used in the operation of an aircraft and the violation creates a substantial risk of physical harm to any person or the aircraft in question is an occupied aircraft, criminal mischief committed in vio-

lation of division (A)(6) of this section is a felony of the fourth degree.

Ohio Rev. Code Ann. § 2921.23(A) (LexisNexis 2014) provides:

(A) No person shall negligently fail or refuse to aid a law enforcement officer, when called upon for assistance in preventing or halting the commission of an offense, or in apprehending or detaining an offender, when such aid can be given without a substantial risk of physical harm to the person giving it.

Ohio Rev. Code Ann. § 2903.31(A) (LexisNexis 2014) provides:

(A) As used in this section, "hazing" means doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization that causes or creates a substantial risk of causing mental or physical harm to any person.

Ohio Rev. Code Ann. § 2909.101(B) (LexisNexis 2014) provides in pertinent part:

(B) Whoever violates this section is guilty of railroad grade crossing device vandalism. Except as otherwise provided in this division, railroad grade crossing device vandalism is a misdemeanor of the first degree. Except as otherwise provided in this division, if the violation of this section causes serious physical harm to property or creates a substantial risk

of physical harm to any person, railroad grade crossing device vandalism is a felony of the fourth degree.

Ohio Rev. Code Ann. § 2917.11(A)(5) (LexisNexis 2014) provides:

(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following:

* * * * *

(5) Creating a condition that is physically offensive to persons or that presents a risk of physical harm to persons or property, by any act that serves no lawful and reasonable purpose of the offender.

Ohio Rev. Code Ann. § 2909.06(B) (LexisNexis 2014) provides:

(B) Whoever violates this section is guilty of criminal damaging or endangering, a misdemeanor of the second degree. If a violation of this section creates a risk of physical harm to any person, criminal damaging or endangering is a misdemeanor of the first degree. If the property involved in a violation of this section is an aircraft, an aircraft engine, propeller, appliance, spare part, or any other equipment or implement used or intended to be used in the operation of an aircraft and if the violation creates a risk of physical harm to any person, criminal damaging or endangering is a felony of the fifth degree. If the property involved in a violation of this section is an aircraft, an aircraft engine, propeller, appliance, spare part, or any other equipment or implement used or intended to be used in

the operation of an aircraft and if the violation creates a substantial risk of physical harm to any person or if the property involved in a violation of this section is an occupied aircraft, criminal damaging or endangering is a felony of the fourth degree.

Ohio Rev. Code Ann. § 2909.03(A) (LexisNexis 2014) provides:

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

(1) Cause, or create a substantial risk of, physical harm to any property of another without the other person's consent;

(2) Cause, or create a substantial risk of, physical harm to any property of the offender or another, with purpose to defraud;

(3) Cause, or create a substantial risk of, physical harm to the statehouse or a courthouse, school building, or other building or structure that is owned or controlled by the state, any political subdivision, or any department, agency, or instrumentality of the state or a political subdivision, and that is used for public purposes;

(4) Cause, or create a substantial risk of, physical harm, through the offer or the acceptance of an agreement for hire or other consideration, to any property of another without the other person's consent or to any property of the offender or another with purpose to defraud;

(5) Cause, or create a substantial risk of, physical harm to any park, preserve, wildlands, brush-covered land, cut-over land, forest, timberland, greenlands, woods, or similar real property that is owned or controlled by another person, the state, or a political subdivision without the consent of the other person, the state, or the political subdivision;

(6) With purpose to defraud, cause, or create a substantial risk of, physical harm to any park, preserve, wildlands, brush-covered land, cut-over land, forest, timberland, greenlands, woods, or similar real property that is owned or controlled by the offender, another person, the state, or a political subdivision.

Ohio Rev. Code Ann. § 2909.09(C) (LexisNexis 2014) provides:

(C) Whoever violates this section is guilty of vehicular vandalism. Except as otherwise provided in this division, vehicular vandalism is a misdemeanor of the first degree. Except as otherwise provided in this division, if the violation of this section creates a substantial risk of physical harm to any person or the violation of this section causes serious physical harm to property, vehicular vandalism is a felony of the fourth degree. Except as otherwise provided in this division, if the violation of this section causes physical harm to any person, vehicular vandalism is a felony of the third degree. If the violation of this section causes serious physical harm to any person, vehicular vandalism is a felony of the second degree.

Ohio Rev. Code Ann. § 2923.162(C) (LexisNexis 2014) provides in pertinent part:

(C) Whoever violates this section is guilty of discharge of a firearm on or near prohibited premises. A violation of division (A)(1) or (2) of this section is a misdemeanor of the fourth degree. A violation of division (A)(3) of this section shall be punished as follows:

* * * * *

(2) Except as otherwise provided in division (C)(3) or (4) of this section, if the violation created a substantial risk of physical harm to any person or caused serious physical harm to property, a violation of division (A)(3) of this section is a felony of the third degree.

Ohio Rev. Code Ann. § 2917.13(C) (LexisNexis 2014) provides:

(C) Whoever violates this section is guilty of misconduct at an emergency. Except as otherwise provided in this division, misconduct at an emergency is a misdemeanor of the fourth degree. If a violation of this section creates a risk of physical harm to persons or property, misconduct at an emergency is a misdemeanor of the first degree.

Ohio Rev. Code Ann. § 2909.27(A) (LexisNexis 2014) provides:

(A) No person shall recklessly use, deploy, release, or cause to be used, deployed, or released any chemical

weapon, biological weapon, radiological or nuclear weapon, or explosive device that creates a risk of death or serious physical harm to another person not a participant in the offense.

Ohio Rev. Code Ann. § 2909.10(E) (LexisNexis 2014) provides:

(E) Except as otherwise provided in this division, railroad vandalism; criminal trespass on a locomotive, engine, railroad car, or other railroad vehicle; and interference with the operation of a train each is a misdemeanor of the first degree. Except as otherwise provided in this division, if the violation of division (A), (B), or (C) of this section causes serious physical harm to property or creates a substantial risk of physical harm to any person, the violation is a felony of the fourth degree. Except as otherwise provided in this division, if the violation of division (A), (B), or (C) of this section causes physical harm to any person, the violation is a felony of the third degree. If the violation of division (A), (B), or (C) of this section causes serious physical harm to any person, the violation is a felony of the second degree.

Ohio Rev. Code Ann. § 2921.31(B) (LexisNexis 2014) provides:

(B) Whoever violates this section is guilty of obstructing official business. Except as otherwise provided in this division, obstructing official business is a misdemeanor of the second degree. If a violation of this section creates a risk of physical harm to any

person, obstructing official business is a felony of the fifth degree.

Oklahoma

Okla. Stat. Ann. tit. 21, § 1287.1 (West 2002) provides:

PENALTY ENHANCEMENT FOR WEAPON POSSESSION

Any person who, while committing or attempting to commit a crime of violence, discharges a firearm, in addition to the penalty provided by statute for the crime of violence committed or attempted, upon conviction, may be charged, in the discretion of the district attorney, with an additional felony for possessing such weapon, which shall be a separate offense punishable, upon conviction, by not less than ten (10) years in the custody of the Department of Corrections which may be served concurrently with the sentence for the crime of violence. For purposes of this section, "crime of violence" means an offense that is a felony and has as an element of the offense, the use, attempted use, or threatened use of physical force against the person of another or that by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing the offense. For purposes of this section, "firearm" means a rifle, pistol or shotgun.

Okla. Stat. Ann. tit. 21, § 1289.11 (Supp. 2015) provides:

It shall be unlawful for any person to engage in reckless conduct while having in his or her possession any shotgun, rifle or pistol, such actions consisting of creating a situation of unreasonable risk and probability of death or great bodily harm to another, and demonstrating a conscious disregard for the safety of another person. Any person convicted of violating the provisions of this section shall be punished as provided in Section 1289.15 of this title.

Oregon

Or. Rev. Stat. § 163.195(1) (2013) provides:

(1) A person commits the crime of recklessly endangering another person if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Or. Rev. Stat. § 162.315 (2013) provides in pertinent part:

(1) A person commits the crime of resisting arrest if the person intentionally resists a person known by the person to be a peace officer or parole and probation officer in making an arrest.

(2) As used in this section:

* * * * *

(c) "Resists" means the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury to any person and includes, but is not limited to, behavior clearly intended to prevent being taken into custody by over-coming the actions of the arresting officer. The behavior does not have to result in actual physical injury to an officer. Passive resistance does not constitute behavior intended to prevent being taken into custody.

Or. Rev. Stat. § 163.197(4)(a) (2013) provides in pertinent part:

(4) As used in this section:

(a) "Haze" means:

* * * * *

(B) To subject an individual to sleep deprivation, exposure to the elements, confinement in a small space or other similar activity that subjects the individual to an unreasonable risk of harm or adversely affects the physical health or safety of the individual;

(C) To compel an individual to consume food, liquid, alcohol, controlled substances or other substances that subject the individual to an unreasonable risk of harm or adversely affect the physical health or safety of the individual;

Or. Rev. Stat. § 163.257(1) (2013) provides in pertinent part:

(1) A person commits the crime of custodial interference in the first degree if the person violates ORS 163.245 and:

* * * * *

(b) Exposes that person to a substantial risk of illness or physical injury.

Pennsylvania

18 Pa. Cons. Stat. Ann. § 5104 (West 1983) provides:

A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa. Cons. Stat. Ann. § 2902 (West Supp. 2014) provides:

(a) Offense defined.—Except as provided under subsection (b) or (c), a person commits a misdemeanor of the first degree if he knowingly:

(1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or

(2) holds another in a condition of involuntary servitude.

(b) Unlawful restraint of a minor where offender is not victim's parent.—If the victim is a person under 18 years of age, a person who is not the victim's parent commits a felony of the second degree if he knowingly:

(1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or

(2) holds another in a condition of involuntary servitude.

(c) Unlawful restraint of minor where offender is victim's parent.—If the victim is a person under 18 years of age, a parent of the victim commits a felony of the second degree if he knowingly:

(1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or

(2) holds another in a condition of involuntary servitude.

Rhode Island

R.I. Gen. Laws Ann. § 11-4-2 provides in pertinent part:

Any person who knowingly causes, procures, aids, counsels or creates by means of fire or explosion a substantial risk of serious physical harm to any person or damage to any building the property of that person or another, whether or not used for residential purposes, which is occupied or in use for any purpose or

which has been occupied or in use for any purpose during the six (6) months preceding the offense or to any other residential structure, shall, upon conviction, be sentenced to imprisonment for not less than five (5) years and may be imprisoned for life, or shall be fined not less than three thousand dollars ($3,000) nor more than twenty-five thousand dollars ($25,000), or both
* * *

R.I. Gen. Laws Ann. § 11-47-61 provides:

Every person who shall discharge a firearm from a motor vehicle in a manner which creates a substantial risk of death or serious injury shall, upon conviction, be fined not less than five thousand dollars ($5,000) nor more than fifty thousand dollars ($50,000) or imprisoned for not less than ten (10) years nor more than twenty (20) years, or both.

R.I. Gen. Laws Ann. § 11-47-51.1(a)(1) provides:

No person shall unlawfully discharge a firearm or incendiary or explosive substance or device from a motor vehicle in a manner which creates a substantial risk of death or serious personal injury to another person. Every person violating the provisions of this section shall be punished by imprisonment for not less than ten (10) years nor more than twenty (20) years and shall be fined not less than five thousand dollars ($5,000.00) nor more than fifty thousand dollars ($50,000.00), or both.

South Dakota

S.D. Codified Laws § 22-11-4 provides in pertinent part:

> Any person who intentionally prevents or attempts to prevent a law enforcement officer, acting under color of authority, from effecting an arrest of the actor or another, by:
>
> * * * * *
>
> (2) Using any other means which creates a substantial risk of causing physical injury to the law enforcement officer or any other person;
>
> is guilty of resisting arrest. Resisting arrest is a Class 1 misdemeanor.

Tennessee

Tenn. Code Ann. § 39-16-603(a)(3) provides:

> (a)(3) A violation of subsection (b) is a Class E felony unless the flight or attempt to elude creates a risk of death or injury to innocent bystanders or other third parties, in which case a violation of subsection (b) is a Class D felony.

Tenn. Code Ann. § 39-13-303(a) provides:

> (a) Kidnapping is false imprisonment as defined in § 39-13-302, under circumstances exposing the other person to substantial risk of bodily injury.

Texas

Tex. Penal Code Ann. § 22.041(b) provides:

(b) A person commits an offense if, having custody, care, or control of a child younger than 15 years, he intentionally abandons the child in any place under circumstances that expose the child to an unreasonable risk of harm.

Tex. Penal Code Ann. § 20.02(c)(2)(A) provides in pertinent part:

(c) An offense under this section is a Class A misdemeanor, except that the offense is:

* * * * *

(2) a felony of the third degree if:

(A) the actor recklessly exposes the victim to a substantial risk of serious bodily injury;

* * * * *

Tex. Penal Code Ann. § 9.42 provides:

A person is justified in using deadly force against another to protect land or tangible, movable property:

(1) if he would be justified in using force against the other under Section 9.41; and

(2) when and to the degree he reasonably believes the deadly force is immediately necessary:

(A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft

during the nighttime, or criminal mischief during the nighttime; or

(B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and

(3) he reasonably believes that:

(A) the land or property cannot be protected or recovered by any other means; or

(B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.

Tex. Penal Code Ann. § 35.02(c)(7)(B) provides:

(c) An offense under Subsection (a) or (b) is:

* * * * *

(7) a felony of the first degree if:

* * * * *

(B) an act committed in connection with the commission of the offense places a person at risk of death or serious bodily injury.

Utah

Utah Code Ann. § 76-5-301(1)(b) provides:

(1) An actor commits kidnapping if the actor intentionally or knowingly, without authority of law, and against the will of the victim:

* * * * *

(b) detains or restrains the victim in circumstances exposing the victim to risk of bodily injury;

Utah Code Ann. § 76-5-112(1) provides:

A person commits reckless endangerment if, under circumstances not amounting to a felony offense, the person recklessly engages in conduct that creates a substantial risk of death or serious bodily injury to another person.

Utah Code Ann. § 76-5-102(1)(c) provides:

(1) Assault is:

* * * * *

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

Vermont

Vt. Stat. Ann. tit. 13, § 3501(a)(1)(B) provides:

(a) As used in this chapter:

(1) "Chemical warfare agents" means:

* * * * *

(B) A dangerous chemical or hazardous material generally utilized in an industrial or commercial process when a person knowingly and intentionally utilizes the material with the intent to cause harm, and the use places persons at risk of serious bodily injury or death, or endangers the environment.

Vt. Stat. Ann. tit. 13, § 2407(a)(1) provides:

(a) A person commits the crime of unlawful restraint in the first degree if that person

(1) knowingly restrains another person under circumstances exposing that person to a risk of serious bodily injury;

Virginia

Va. Code Ann. § 18.2-286.1 provides:

Any person who, while in or on a motor vehicle, intentionally discharges a firearm so as to create the risk of injury or death to another person or thereby cause another person to have a reasonable apprehension of injury or death shall be guilty of a Class 5 felony. Nothing in this section shall apply to a law-enforcement officer in the performance of his duties.

Washington

Wash. Rev. Code Ann. § 9A.42.030(1) provides:

(1) A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the second degree if he or she recklessly, as defined in RCW 9A.08.010, either (a) creates an imminent and substantial risk of death or great bodily harm, or (b) causes substantial bodily harm by withholding any of the basic necessities of life.

Wash. Rev. Code Ann. § 9A.36.050(1) provides:

(1) A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.

Wash. Rev. Code Ann. § 9A.36.045(1) provides:

(1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

Wash. Rev. Code Ann. § 9A.84.020(1) provides:

(1) A person is guilty of failure to disperse if:

(a) He or she congregates with a group of three or more other persons and there are acts of conduct within that group which create a substantial risk of causing injury to any person, or substantial harm to property; and

(b) He or she refuses or fails to disperse when ordered to do so by a peace officer or other public servant engaged in enforcing or executing the law.

Wash. Rev. Code Ann. § 9A.42.070(1) provides in pertinent part:

(1) Except as provided in subsection (2) of this section, a person is guilty of the crime of abandonment of a dependent person in the second degree if:

(a) The person is the parent of a child, a person entrusted with the physical custody of a child or other dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or other dependent person any of the basic necessities of life; and

(b) The person recklessly abandons the child or other dependent person; and:

* * * * *

(ii) Abandoning the child or other dependent person creates an imminent and substantial risk that the child

or other dependent person will die or suffer great bodily harm.

Wash. Rev. Code Ann. § 9A.42.035(1)(a) provides:

(1) A person is guilty of the crime of criminal mistreatment in the third degree if the person is the parent of a child, is a person entrusted with the physical custody of a child or other dependent person, is a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or is a person employed to provide to the child or dependent person the basic necessities of life, and either:

(a) With criminal negligence, creates an imminent and substantial risk of substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life;

Wash. Rev. Code Ann. § 9A.42.080(1) provides in pertinent part:

(1) Except as provided in subsection (2) of this section, a person is guilty of the crime of abandonment of a dependent person in the third degree if:

(a) The person is the parent of a child, a person entrusted with the physical custody of a child or other dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person any of the basic necessities of life; and

(b) The person recklessly abandons the child or other dependent person; and:

* * * * *

(ii) Abandoning the child or other dependent person creates an imminent and substantial risk that the child or other person will suffer substantial bodily harm.

Wash. Rev. Code Ann. § 9A.42.037(1)(a) provides:

(1) A person is guilty of the crime of criminal mistreatment in the fourth degree if the person is the parent of a child, is a person entrusted with the physical custody of a child or other dependent person, is a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or is a person employed to provide to the child or dependent person the basic necessities of life, and either:

(a) With criminal negligence, creates an imminent and substantial risk of bodily injury to a child or dependent person by withholding any of the basic necessities of life;

Wash. Rev. Code Ann. § 9A.40.060 provides in pertinent part:

* * * * *

(1) A relative of a child under the age of eighteen or of an incompetent person is guilty of custodial interference in the first degree if, with the intent to deny access to the child or incompetent person by a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person, the

relative takes, entices, retains, detains, or conceals the child or incompetent person from a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person and:

* * * * *

(b) Exposes the child or incompetent person to a substantial risk of illness or physical injury; or

* * * * *

(2) A parent of a child is guilty of custodial interference in the first degree if the parent takes, entices, retains, detains, or conceals the child, with the intent to deny access, from the other parent having the lawful right to time with the child pursuant to a court-ordered parenting plan, and:

* * * * *

(b) Exposes the child to a substantial risk of illness or physical injury;

West Virginia

W. Va. Code Ann. § 61-2-9c provides:

Any person who, during the manufacture or production of an illegal controlled substance uses fire, the use of which creates substantial risk of death or serious bodily injury to another due to the use of fire, is guilty of a felony and, upon conviction, shall be committed to the custody of the Division of Corrections for a definite term of years of not less than one nor more than five years or, in the discretion of the court, confined in the regional jail for not more than one year, or

fined not less than two hundred fifty dollars or more than two thousand five hundred dollars, or both.

W. Va. Code Ann. § 61-3E-10 provides:

Any person who wantonly performs any act with a destructive device, explosive material or incendiary device which creates substantial risk of death or serious bodily injury to another shall be guilty of a felony and, upon conviction thereof, shall be committed to the custody of the division of corrections for not less than two years nor more than ten years or fined not more than ten thousand dollars, or both.

W. Va. Code Ann. § 61-8D-3 provides in pertinent part:

* * * * *

(c) Any parent, guardian or custodian who abuses a child and by the abuse creates a substantial risk of death or serious bodily injury, as serious bodily injury is defined in section one, article eight-b of this chapter, to the child is guilty of a felony and, upon conviction thereof, shall be fined not more than $3,000 or imprisoned in a state correctional facility for not less than one nor more than five years, or both.

(d)(1) If a parent, guardian or custodian who has not previously been convicted under this section, section four of this article or a law of another state or the federal government with the same essential elements abuses a child and by the abuse creates a substantial risk of bodily injury, as bodily injury is defined in section one, article eight-b of this chapter, to the child is guilty of a misdemeanor and, upon conviction there-

of, shall be fined not less than $100 nor more than $1,000 or confined in jail not more than six months, or both.

W. Va. Code Ann. § 61-8D-4 provides in pertinent part:

* * * * *

(c) If a parent, guardian or custodian grossly neglects a child and by that gross neglect creates a substantial risk of death or serious bodily injury, as serious bodily injury is defined in section one, article eight-b of this chapter, of the child then the parent, guardian or custodian is guilty of a felony and, upon conviction thereof, shall be fined not less than $1,000 nor more than $3,000 dollars or imprisoned in a state correctional facility for not less than one nor more than five years, or both.

(d)(1) If a parent, guardian or custodian who has not been previously convicted under this section, section three of this article or a law of another state or the federal government with the same essential elements neglects a child and by that neglect creates a substantial risk of bodily injury, as defined in section one, article eight-b of this chapter, to the child, then the parent, guardian or custodian, is guilty of a misdemeanor and, upon conviction thereof, for a first offense, shall be fined not less than $100 nor more than $1,000 or confined in jail not more than six months, or both fined and confined.

W. Va. Code Ann. § 61-7-12 provides:

Any person who wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another shall be guilty of a felony, and, upon conviction thereof, shall be confined in the penitentiary for a definite term of years of not less than one year nor more than five years, or, in the discretion of the court, confined in the county jail for not more than one year, or fined not less than two hundred fifty dollars nor more than two thousand five hundred dollars, or both.

W. Va. Code Ann. § 61-3-29(b) provides:

(b) Any person who knowingly and willfully: (1) Damages or destroys any real or personal property owned by a railroad company, or public utility company, or any real or personal property used for producing, generating, transmitting, distributing, treating or collecting electricity, natural gas, coal, water, wastewater, stormwater, telecommunications or cable service; and (2) creates a substantial risk of serious bodily injury to another or results in the interruption of service to the public is guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or confined in a state correctional facility not less than one nor more than three years, or both fined and imprisoned.

Wisconsin

Wis. Stat. Ann. § 939.24(1) provides:

(1) In this section, "criminal recklessness" means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk * * * .

Wis. Stat. Ann. § 939.25(1) provides:

In this section, "criminal negligence" means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another * * * .

Wis. Stat. Ann. § 940.19(6) provides in pertinent part:

(6) Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony. * * *

Wis. Stat. Ann. § 948.03 provides in pertinent part:

(1) Definitions. In this section, "recklessly" means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child.

* * * * *

(4) Failing to act to prevent bodily harm.

(a) A person responsible for the child's welfare is guilty of a Class F felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused great bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of great bodily harm by the other person or facilitates the great bodily harm to the child that is caused by the other person.

(b) A person responsible for the child's welfare is guilty of a Class H felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of bodily harm by the other person or facilitates the bodily harm to the child that is caused by the other person.

Wis. Stat. Ann. § 941.11 provides:

Whoever does either of the following is guilty of a Class H felony:

(1) Intentionally burns his or her own building under circumstances in which he or she should realize he or she is creating an unreasonable risk of death or great bodily harm to another or serious damage to another's property; or

(2) Intentionally burns a building of one who has consented to the destruction thereof but does so under circumstances in which he or she should realize he or she is creating an unreasonable risk of death or great bodily harm to another or serious damage to a 3rd person's property.

Wis. Stat. Ann. § 940.295(1)(km) provides:

1) Definitions. In this section:

* * * * *

(km) "Negligence" means an act, omission, or course of conduct that the actor should realize creates a substantial and unreasonable risk of death, great bodily harm, or bodily harm to another person.

Wis. Stat. Ann. § 939.45 provides in pertinent part:

The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:

* * * * *

(5)(b) When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.

Wis. Stat. Ann. § 940.285(1)(dm) provides:

(1) Definitions. In this section:

* * * * *

(dm) "Recklessly" means conduct that creates a situation of unreasonable risk of harm and demonstrates a conscious disregard for the safety of the vulnerable adult.

Wyoming

Wyo. Stat. Ann. § 6-2-202(a)(1) provides:

(a) A person is guilty of felonious restraint if he knowingly:

(1) Restrains another unlawfully in circumstances exposing him to risk of serious bodily injury;

Wyo. Stat. Ann. § 6-1-104(a) provides in pertinent part:

(a) As used in this act, unless otherwise defined:

* * * * *

(iii) "Criminal negligence" is defined as the following conduct: A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that the failure to perceive it constitutes a gross devia-

tion from the standard of care that a reasonable person would observe in the situation;

* * * * *

(ix) "Recklessly" is defined as the following conduct: A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation;

AMICUS CURIAE BRIEF

No. 13-7120

Supreme Court, U.S.
AUG 25 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE BRADY CENTER TO PREVENT GUN VIOLENCE and INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether unlawful possession of a firearm poses a serious potential risk of physical injury so as to constitute a "violent felony" within the meaning of the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(b)(ii).

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CASES

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Begay v. *United States*,
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Cook v. *Wiley*,
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District of Columbia v. *Heller*,
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Huddleston v. *United States*,
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James v. *United States*,
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McDonald v. *City of Chicago*,
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Moore v. *Warden, FCC Coleman-Medium*,
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(11th Cir. June 10, 2014)..... 24

Scarborough v. *United States*,
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Cited Authorities

Page

State v. *Chippey*,
33 A. 438 (Del. Ct. Gen. Sess. 1892). 24

Sykes v. *United States*,
131 S. Ct. 2267 (2011). . . . . *passim*

Taylor v. *United States*,
495 U.S. 575 (1990). . . . . *passim*

United States v. *Castleman*,
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United States v. *Dillard*,
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United States v. *Doe*,
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United States v. *Hall*,
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United States v. *Hayes*,
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United States v. Huddleston,
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United States v. *Johnson*,
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United States v. *Lopez*,
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United States v. *Rogers*,
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United States v. *Stinson*,
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Stinson v. *United States*,
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18 U.S.C. § 922(g) .... .14

18 U.S.C. § 922(q) 21, 23

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Ark. Code Ann. § 5-73-104 (West 2014) 25

Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) 2

Colo. Rev. Stat. Ann. § 18-12-102 (West 2014) 26

Colo. Rev. Stat. Ann. § 18-12-105.5 (West 2014) . . . 21-22

Fla. Stat. Ann. § 790.115 (West 2014) 22

Fla. Stat. Ann. § 790.145 (West 2014) 22

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Minn. Stat. Ann. § 609.1095 (West 2014) 20

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Miss. Code Ann. § 97-37-17 (West 2014) 22

N.Y. Penal Law § 70.02 (McKinney) 20

N.Y. Penal Law § 265.02 (McKinney) 20

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009 (1996) 23

Cited Authorities

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18 Pa. Cons. Stat. § 908 (2014). .... .26

Tex. Penal Code Ann. § 46.03 (West 2014).. ..... .22

Tex. Penal Code Ann. § 46.05 (West 2014).... ..... .26

Utah Code Ann. § 76-3-203.5 (West 2014) .... .20

Utah Code Ann. § 76-10-503 (West 2014). ..... .20

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Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193 (2003) .... .25

Jeffrey C. Bright, *Violent Felonies Under the Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun Without a Permit Should Be Considered a Violent Felony*, 48 Duq. L. Rev. 601 (2010)..... ..... .11

Cited Authorities

Page

Centers for Disease Control & Prevention, *Deaths: Final Data for 2011*, 63 Nat'l Vital Statistics Reports, No. 1 (forthcoming 2014), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_03.pdf. 7

Comm. on Injury & Poison Prevention, Am. Acad. of Pediatrics, *Firearm-Related Injuries Affecting the Pediatric Population*, 105 Pediatrics 888 (2000) 7, 23

Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA. L. Rev. 1041 (2009) 7, 8

Philip J. Cook et al., *Underground Gun Markets*, 117 Econ. J. F558 (2007) 3

Philip J. Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, J. Pub. Econ. 379 (2006) . .9

Philip J. Cook, *The Technology of Personal Violence*, 14 Crime & Just. 1 (1991) 8, 25

Hashem Dezhbakhsh & Paul Rubin, *Lives Saved or Lives Lost? The Effects of Concealed-Handgun Laws on Crime*, 88 Am. Econ. Rev. 473 (1998) 24

Cited Authorities

Page

John J. Donohue, *The Impact of Concealed-Carry Laws, in Evaluating Gun Policy Effects on Crime and Violence* 289 (2003) 24

Mark Duggan, *More Guns, More Crime,* 109 J. Pol. Econ. 1086 (2001) 10

Everytown for Gun Safety, *Analysis of School Shootings* (Feb. 2014), http://everytown.org/article/schoolshootings/ (last visited Aug. 24, 2014)..... 22

Caroline Wolf Harlow, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders* (2001), *available at* http://bjs.gov/content/pub/pdf/fuo.pdf.....18, 21

Peter Hermann, *Delving More Deeply Into Shooting Stats*, The Baltimore Sun, Sept. 24, 2009, *available at* http://articles.baltimoresun.com/2009-09-24/news/0909230076_1_nonfatal-shootings-arrests-numbers..... 6

Chris Kirk, *Since 1980, 297 People Have Been Killed in School Shootings,* Slate (Dec. 19, 2012), http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/12/sandy_hook_a_chart_of_all_196_fatal_school_shootings_since_1980_map.html 22

Cited Authorities

Page

Evan Tsen Lee et al., *Which Felonies Pose a "Serious Potential Risk of Injury" for Federal Sentencing Purposes?*, 26 Fed. Sent'g Rep. 118 (2013) 6, 12-13

Matthew Miller et al., *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 Soc. Sci. & Med. 656 (2007) 10

Matthew Miller et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 Amer. J. Pub. Health 1988 (2002) 7

Craig Perkins, *National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime* (2003), *available at* http://www.bjs.gov/content/pub/pdf/wuvc01.pdf 22

1 Albert J. Reiss, Jr. & Jeffrey A. Roth, *Understanding and Preventing Violence* (1993) 8

Michael Siegel et al., *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981-2010*, 103 Am. J. Pub. Health, no. 11, 2013. 10

Cited Authorities

Page

Katherine A. Vittes et al., *Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership, in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* 65 (Daniel W. Webster & Jon S. Vernick eds., 2013) 18

William Wells & Julie Horney, *Weapon Effects and Individual Intent To Do Harm: Influences on the Escalation of Violence*, 40 Criminology 265 (2002) 8

Garen J. Wintemute, *Comprehensive Background Checks: New Evidence and Rethinking "Comprehensive," in Updated Evidence and Policy Developments on Reducing Gun Violence in America* 17 (Daniel W. Webster & Jon S. Vernick eds., 2014)..... 21

Mona A. Wright et al., *Effectiveness of Denial of Handgun Purchase to Persons Believed To Be at High Risk for Firearm Violence*, 89 Am. J. Pub. Health 88 (1999) 18-19

Marianne W. Zawitz, *Firearms, Crime, and Criminal Justice: Firearm Injury from Crime* (1995), *available at* http://www.bjs.gov/content/pub/pdf/FIFC.PDF ..... .11

Cited Authorities

Page

Franklin E. Zimring & Gordon Hawkins, *The Citizen's Guide to Gun Control* (1987) 11

Franklin E. Zimring & Gordon Hawkins, *Crime is not the Problem: Lethal Violence in America* (1997)..... 11

INTEREST OF AMICI CURIAE[1]

The Brady Center to Prevent Gun Violence is the nation's oldest and largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous *amicus* briefs in cases before this Court involving the interpretation and application of firearms regulations including *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), *United States* v. *Hayes*, 555 U.S. 415, 427 (2009) (citing Brady Center brief), *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), *United States* v. *Castleman*, 134 S. Ct. 1405 (2014), and *Abramski* v. *United States*, 134 S. Ct. 2259 (2014). The Brady Center's Legal Action Project has studied and published reports on the dangers posed by felons in possession of firearms and has a substantial interest in the proper interpretation of federal gun laws to prevent gun violence.

The International Brotherhood of Police Officers (IBPO) is one of the largest police unions in the country, representing a significant number of members across the nation. While the IBPO fully supports and defends the Second Amendment right to keep and bear arms, it strongly supports reasonable federal and state gun laws that protect the public and law enforcement officers from persons who cannot be trusted to possess firearms.

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1. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Possession offenses—laws that keep guns out of the hands of people who, because of their potential danger, are prohibited from possessing them—form a core of gun violence prevention laws. Federal law has established a system of background checks that seeks to prevent individuals who should not acquire a firearm from purchasing one from licensed dealers, and some state laws also require background checks for some or all gun purchases from unlicensed sellers. The Brady Law, which was signed into law two decades ago, established mandatory verification of statements on applications to buy firearms, including whether the purchaser is a prohibited person. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993). Brady background checks have prevented over two million purchases by individuals who are not legally permitted to own a gun. Background checks alone, however, cannot accomplish regulation of possession.

Firearms pose unique risks to people and property in the United States. They may be used for recreational purposes such as hunting. They also play a role in lawful self-defense. *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). The force that makes them useful for those purposes, however, also makes them a tool of crime. In the wrong place or in the wrong hands, they become an instrument of destructive violence. This Court's jurisprudence has both recognized the right to lawful uses of guns, *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), and upheld legislation restricting possession by individuals who have proven themselves untrustworthy or dangerous. *Scarborough* v. *United States*, 431 U.S. 563 (1977); *Huddleston* v. *United States*, 415 U.S. 814

(1974). This case raises a question about the appropriate penalty for people who repeatedly break laws, including by illegally possessing a firearm.

Criminals and individuals intent on crime can still obtain weapons through backchannels. As federal law and the law of most states allow guns to be sold by unlicensed sellers without a Brady background check, an estimated forty percent of firearm purchases occur outside the system of background checks. Shadowy transactions include those for illegal weapons, without a record, that are particularly attractive to criminals. "Underground gun markets have developed in the U.S. in response to federal regulations that seek to prohibit ownership and possession by that sub-set of the population deemed to be at unacceptably high risk of misusing guns—primarily youth and adults with serious prior criminal records—while preserving easy access for everyone else." Philip J. Cook et al., *Underground Gun Markets*, 117 Econ. J. F558, F558 (2007).

The Petitioner in this case, for example, was an active participant in the black market for weapons and was apprehended after disclosing to an FBI officer that he had manufactured napalm and other explosives for the Aryan movement, and admitted to possessing an AK-47 rifle and a semi-automatic handgun, along with a large cache of ammunition. *United States* v. *Johnson*, 526 F. App'x 708, 709 (8th Cir. 2013). He had been previously convicted for two robberies and possessing a sawed-off shotgun.

Possession offenses target offenders who skirted the controls on acquisition of guns. These laws recognize the risks to society posed by lawbreakers possessing such potent weapons, and use the criminal justice system to remove or minimize those risks. They are not concerned

with firearms in the abstract, but rather gun possession in combination with other factors that create a likelihood of misuse of firearms. They complement mechanisms such as background checks by combatting illegal possession when laws restricting firearms purchases have been circumvented.

Laws criminalizing dangerous firearms possession form part of a network of regulations and crimes that outline the permissible use of firearms in American society. This Court recently recognized the role of two other parts of that network in preventing gun violence in *United States* v. *Castleman*, 134 S. Ct. 1405 (2014) (possession by domestic violence offenders), and *Abramski* v. *United States*, 134 S. Ct. 2259 (2014) (straw purchasing). This case arises from another facet of controls on the presence of weapons in society: possession of a sawed-off shotgun, widely considered to be a particularly dangerous form of firearm.

In particular, this case raises the question of the appropriate punishment under the Armed Career Criminal Act ("ACCA") for a repeat offender whose prior crimes include defying restrictions on firearm possession. As context for determining the applicability of the sentencing enhancement provision to the particular offense of possessing a sawed-off shotgun, this brief explores the broader landscape of criminal possession of firearms. Through the lens of the ACCA, it demonstrates the critical role of these laws in preventing gun violence. This analysis supports amici's position that illegal possession of firearms should fit within the "violent felony" framework of the ACCA.

ARGUMENT

The ACCA establishes enhanced sentences for any repeat offender who is "the kind of person who might deliberately point the gun and pull the trigger." *Sykes* v. *United States*, 131 S. Ct. 2267, 2275 (2011). Congress did not limit the ACCA "to offenders who had actually been convicted of crimes against violence against persons." *Taylor* v. *United States*, 495 U.S. 575, 588 (1990). From its origins, instead, the ACCA has aimed to identify criminals whose actions evince a likelihood that they will commit gun violence in the future—and keep them off the streets before they do so. The provision at issue in this case does so by establishing fifteen-year mandatory minimum sentence for repeat offenders who have committed three violent felonies, defined in part as a felony that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). The final clause of this provision is known as the "residual clause" of the ACCA.

Rather than an exact test, the ACCA "states a normative principle." *Sykes*, 131 S. Ct. at 2277 ("Congress chose to frame ACCA in general and qualitative, rather than encyclopedic, terms."). The residual clause of the ACCA does not look at whether the elements of the offense necessarily include causing physical injury, but rather whether the events set in motion by the offense may entail a risk of physical injury. *James* v. *United States*, 550 U.S. 192, 199 (2007) ("[T]he most relevant common attribute of the enumerated offenses is that all of these offenses, while not technically crimes against the person nevertheless create significant risks of bodily injury or confrontation that might result in bodily injury."). In *Sykes*, this Court started the residual clause

analysis by looking at how the "perpetrator's indifference to the[] collateral consequences" of the predicate offense had "violent—even lethal potential for others." 131 S. Ct. at 2273. The *Sykes* Court, holding that intentional vehicular flight constitutes a violent felony, determined that the residual clause analysis encompassed the risks created where "[e]ven if the criminal attempting to elude capture drives without going full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody." *Id.* The residual clause thus focuses on setting in motion "destructive forces."

The link between weapons offenses and other violent crimes supports holding that illegal possession of firearms fits into the "violent felony" framework of the ACCA. For example, a study conducted in Baltimore, Maryland, found that "firearms violations are a stronger indication than drug arrests of a person's likelihood to commit murder." Peter Hermann, *Delving More Deeply Into Shooting Stats*, The Baltimore Sun, Sept. 24, 2009, at 1, *available at* http://articles.baltimoresun.com/2009-09-24/news/0909230076_1_nonfatal-shootings-arrests-numbers. Another study found evidence that "weapons law violations not uncommonly co-occur with such forcible crimes as robbery, simple assault, and aggravated assault." Evan Tsen Lee et al., *Which Felonies Pose a "Serious Potential Risk of Injury" for Federal Sentencing Purposes?*, 26 Fed. Sent'g Rep. 118, 120 (2013). Part I of this brief explores the interaction of the risks posed by firearms possession and the logic of the ACCA. Part II then examines how the rationales for specific laws banning firearms possession by certain people, in particular places or manners, or of specific types of weapons, are consistent with the named felonies in § 924(e)(2)(B)(ii).

I. Weapons Possession Offenses Demonstrate Disregard For Societal Decisions To Regulate The Risks Of Physical Injury Created By The Presence Of Firearms

According to the Center for Disease Control, firearms were used to cause over 32,351 deaths in 2011, 11,068 of which were homicides. Those 11,068 firearm homicides represent more than two-thirds of the 16,238 homicides committed in 2011. Centers for Disease Control & Prevention, *Deaths: Final Data for 2011*, 63 Nat'l Vital Statistics Reports, No. 1, Table 18 (forthcoming 2014), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_03.pdf. This level of violence is consistent with previous years. *See, e.g.*, Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA. L. Rev. 1041, 1047 (2009) (including homicide, suicide, and accidental deaths, 30,694 Americans died by gunfire in 2005, amounting to a gun-related mortality rate of 10.4 deaths per 100,000 people for the year); Matthew Miller et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 Amer. J. Pub. Health 1988, 1988 (2002) (noting that of the 233,251 people who were homicide victims in the United States between 1988 and 1997, 68% were killed with guns). Gun violence takes a heavy toll on young people. Comm. on Injury & Poison Prevention, Am. Acad. of Pediatrics, *Firearm-Related Injuries Affecting the Pediatric Population*, 105 Pediatrics 888, 888 (2000) ("In 1997 firearm-related deaths accounted for 22.5% of all injury deaths of individuals between 1 and 19."). The United States incurs a substantial financial cost due to gun violence, particularly gunshot wounds related to crime. Philip Cook, et al., *Gun Control After Heller*, 56 UCLA.

L. Rev. at 1049 (citing a survey which found that the costs of gun violence were on the order of $100 billion in 1995, $80 billion of which came from crime-related violence).

Guns present a unique danger because they enhance the power of an individual to inflict physical harm more than other weapons. They enable "killing [to] be accomplished from a distance without much risk of effective counterattack by the victim, and the killing can be completed quickly, without sustained effort, and in a relatively impersonal fashion." Philip J. Cook, *The Technology of Personal Violence*, 14 Crime & Just. 1, 28-29 (1991); *see also* William Wells & Julie Horney, *Weapon Effects and Individual Intent To Do Harm: Influences on the Escalation of Violence*, 40 Criminology 265, 286, 291 (2002) (explaining that guns are believed to produce more serious injuries and a greater likelihood of death than other weapons because of their technical properties and because doing serious harm with a gun requires less strength and sustained effort on the part of an assailant) In addition, due to knowledge of these attributes, "the mere display of a gun communicates a highly effective threat." Cook, *Technology of Personal Violence*, 14 Crime & Just. at 28–29. Unsurprisingly, the number of fatal injuries from guns has been reported to be five times greater than for injuries caused by knives, the second most lethal weapon. 1 Albert J. Reiss, Jr. & Jeffrey A. Roth, *Understanding and Preventing Violence* 260 (1993); *see also* Cook, *Gun Control After Heller*, 56 UCLA. L. Rev. at 1073 ("With a gun, unlike a knife, one individual can kill another quickly, at a distance, on impulse."). Studies also link higher rates of gun ownership with higher homicide rates, which indicates that guns

intensify violence. Philip Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, J. Pub. Econ. 379, 387 (2006). This Court recently recognized the risk of violence posed by guns. *Castleman*, 134 S. Ct. at 1409 ("'[A]ll too often,' as one Senator noted during the debate over § 922(g)(9), 'the only difference between a battered woman and a dead woman is the presence of a gun.'" (quoting 142 Cong. Rec. 22986 (1996) (statement of Sen. Wellstone))). As the New York legislature explained while recently strengthening penalties for illegal firearm possession and sales, "[i]n the wrong hands, guns are weapons of untold destruction and heart-break: family and community members are taken from us in an instant; mass shootings shatter our sense of safety in public spaces; street crimes plague our neighborhoods." 2013 N.Y. Sess. Laws 1554 (McKinney) (emphasis added).

A. The Illegal Presence Of Guns Increases Potential For Violence

The residual clause looks to the universe of possibilities for violence created by the offense to determine whether it poses a risk within the meaning of the clause. The residual provision is stated in terms of "potential risk" which is an inherently probabilistic concept. *James*, 550 U.S. at 207-08. Among property crimes, Congress focused on burglary "because of its inherent potential for harm to persons." *Taylor*, 495 U.S. at 588 (contrasting burglary with larceny and auto theft). That potential develops out of two dimensions. First, "enter[ing] a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Id.* Second, "the

offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape." *Id.*[2]

The Senate report on the ACCA explained that while burglary can be "a non-violent crime, its character can change rapidly, depending on the *fortuitous presence* of the occupants of the home when the burglar enters, or their

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2. Although not distinguishing between legal and illegal possession, studies show that as a general matter, higher rates of gun possession are associated with higher rates of firearm violence. A 2007 survey found that states in the highest quartile of firearm prevalence exhibited firearm homicide rates 114% higher and overall homicide rates 60% higher than states in the lowest quartile of firearm prevalence. Matthew Miller at al., *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 Soc. Sci. & Med. 656, 659-60 (2007) (observing further that the increase in homicide rates was due to gun-related violence as homicides not related to firearms were not significantly correlated with gun ownership). Another study showed that for each percentage point increase in gun ownership, the firearm homicide rate increased by 0.9%. Michael Siegel et al., *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981-2010*, 103 Am. J. Pub. Health, no. 11, 2013, at 1. Although it has been theorized that gun ownership may rise in response to crime, one study found that the correlation between homicide and gun ownership found that gun ownership increased *before* increases in the homicide rate in a locality. Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1088 (2001) ("[C]hanges in homicide and gun ownership are significantly positively related. This relationship is almost entirely driven by the relationship between lagged changes in gun ownership and current changes in homicide, suggesting that the relationship is not driven simply by individuals' purchase of guns in response to increases in criminal activity.").

arrival while he is still on the premises." *Taylor*, 495 U.S. at 581 (quoting S. Rep. No. 98–190, at 4–5 (1983)) (emphasis added). Similarly, although possessing a gun does not immediately cause violence in all cases, its "fortuitous presence" in an interaction creates the possibility for violence. Studies show, for example, that people are more likely to be the victim of gun violence during the course of an argument than during the commission of another crime. Marianne W. Zawitz, *Firearms, Crime, and Criminal Justice: Firearm Injury from Crime*, at 4 (1995), *available at* http://www.bjs.gov/content/pub/pdf/FIFC.PDF (noting that of the firearm homicide victims killed between June 1992 and May 1993, 29% were killed because of an argument compared to 21% who were killed during the commission of another crime); Jeffrey C. Bright, *Violent Felonies Under the Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun Without a Permit Should Be Considered a Violent Felony*, 48 Duq. L. Rev. 601, 605 (2010) ("[A] person is far more likely to be killed by a handgun in connection with a brawl or argument than from a rape, robbery, or burglary."). The decision to possess a firearm creates the risk of gun violence whenever a tense situation arises and not simply where the owner already intends to use it to commit a crime. *See* Franklin E. Zimring & Gordon Hawkins, *The Citizen's Guide to Gun Control* 16 (1987) (finding that the circumstances in which most homicides were committed suggested that they occurred in a moment of rage and were not the result of a single-minded intent to kill); Franklin E. Zimring & Gordon Hawkins, *Crime is not the Problem: Lethal Violence in America* 122-23 (1997) ("The combination of the ready availability of guns and the willingness to use maximum force in interpersonal conflict is the most important single contribution to the

high U.S. death rate from violence). When firearms are illegally possessed by persons prohibited to have them because of their dangerousness, these risks of violence can only be greater.

B. The Risk Created By Illegal Weapons Possession Is Comparable To The Enumerated Violent Felonies

An offense poses a serious risk for the purposes of the residual clause where the risk of potential violence is comparable to those of the offenses enumerated in § 924(e)(2)(B)(ii): burglary, arson, extortion, and use of explosives. *James*, 550 U.S. at 203. Congress did not only include felonies that always create an extraordinary level of risk. As the *Taylor* Court noted with regard to burglary, "[t]here never was any proposal to limit the predicate offense to some special subclass of burglaries that might be especially dangerous, such as those where the offender is armed, or the building is occupied, or the crime occurs at night." *Taylor*, 495 U.S. at 588; *see also James*, 550 U.S. at 207-08 ("The ACCA does not require metaphysical certainty.").

Statistical evidence provides useful guidance in comparing the seriousness of the offense to the enumerated felonies. *See Sykes*, 131 S. Ct. at 2274 ("Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony."). One study analyzed the relationship between physical injury and over forty different offenses, including weapon law violations, in the Uniform Crime Reporting Program's National-Incident Based Reporting System (NIBRS). Evan Tsen Lee et al., *Which Felonies*

Pose a "Serious Potential Risk of Injury for Federal Sentencing Purposes, 26 Fed. Sent'g Rep. 118 (2013).[3] Weapon law violations were defined as "[t]he violation of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons." *Id.* at 122. According to the NIBRS statistics, weapon law violations were more strongly associated with physical injury (5.36%) than extortion (4.41%), arson (1.11%), and burglary (1.02%). *Id.* at 119-20.

C. Illegal Weapons Possession Purposefully Introduces The Risk Of Gun Violence Where A Legislature Has Determined It Is Impermissible

The decision to possess a firearm in contravention of laws designed to minimize the risk posed by guns falls within the zone of "purposeful, violent, or aggressive" conduct identified by this Court in *Begay* v. *United States*, 553 U.S. 137, 145 (2008). Although that gloss on the statute is not dispositive, *Sykes*, 131 S. Ct. at 2275, it provides further insight into how illegal weapons possession fits into the residual clause. The *Begay* gloss provides a lens for distinguishing crimes that "reveal

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3. The NIBRS statistics are based on the offenses originally reported rather than the charges ultimately pressed by the prosecutor. The NIBRS database does not draw from a statistically representative sample of federal and state law enforcement agencies because participation is both voluntary and involves a certification process. As of 2010, however, the agencies reporting data covered approximately thirty percent of the U.S. population, so the results are still instructive for the purposes of the residual clause analysis. *Id.*

a degree of callousness toward risk" but do not "show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 553 U.S. at 146. Unlike driving under the influence in *Begay*, which bore no qualitative relationship to the concerns addressed by the ACCA, illegal weapons possession demonstrates a willingness to violate laws intended to reduce gun violence, and preparation to be able to wield the violent force of a gun. *See Taylor*, 495 U.S. at 588 (explaining that the risk of violence from burglary in part comes from offender's "preparation to use violence if necessary"). Even if a possession offense does not, on its face, appear purposeful, it is more like burglary than drunk driving for ACCA purposes. As the Tenth Circuit has explained, a person possessing a weapon in violation of 18 U.S.C. § 922(g)(8) or (9) "is reckless of the risk of committing an intentional act of violence; a drunk driver is reckless of the risk that he will accidently cause harm." *United States* v. *Rogers*, 371 F.3d 1225, 1232 (10th Cir. 2004) (citing *United States* v. *Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003)).

Illegally possessing guns purposefully embraces these risks despite society's decision that they are unacceptable in the circumstances defined by the possession offense. The rationales supporting specific firearms possession offenses illustrate in detail how the choice to break laws controlling the presence of guns in society falls within the residual clause of the ACCA.

II. Each Category Of Weapons Possession Offenses Poses Risks Such That They Should Be Classified As Violent Felonies

In its Second Amendment jurisprudence, this Court has recognized categories of "presumptively lawful" regulations of firearms. *Heller*, 554 U.S. at 627 n.26. These laws include "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27. Communities may choose to legislate differently within that zone. *McDonald*, 130 S. Ct. at 3046 ("As noted by the 38 States that have appeared in this case as amici supporting petitioners, '[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.'"); *see also id.* at 3095 (Stevens, J., dissenting) (explaining that "the relevant regulatory interests vary significantly across localities"). These legislative decisions represent an effort to balance the benefits and dangers of firearms. *See id.* at 3108 (Stevens, J., dissenting) (explaining that it would be reasonable for a legislature, "in considering what sorts of regulations would best serve the public welfare," to weigh a firearm's "marginal contribution to self-defense" against "its marginal contribution to the risk of accident, suicide, and criminal mischief" because it could make the community "less safe overall"). Illegal possession of a firearm defies a community's calibration of the risk of firearms by augmenting the possibility of injury and violence. Examination of the different areas of presumptively lawful regulations identified in *Heller* further shows how the act of illegal gun possession is a violent felony under the ACCA.

A. Illegal Weapons Possession By Groups Of People Who Cannot Be Trusted To Wield Firearms Creates A Serious Potential Risk Of Physical Injury

Keeping firearms out of the hands of "those whose possession thereof was contrary to the public interest" is a core purpose of federal gun violence prevention laws. *United States* v. *Huddleston*, 415 U.S. 814, 824 (1974). Such legislation recognizes the link between the ability of individuals who should not possess firearms "because of age, criminal background, or incompetency," and "the prevalence of lawlessness and violent crime in the United States." *Id.* (noting that the effort to restrict possession was intended to "curb crime"). In the context of sentencing laws, whether the crime of possession of a firearm by a felon is a "violent" crime has particularly provoked debate under various statutes. *Compare United States* v. *Dillard*, 214 F.3d 88 (2d Cir. 2000) (Leval, J.) (holding that illegal firearm possession by a convicted felon constitutes a crime of violence under the Bail Reform Act), *with United States* v. *Lane*, 252 F.3d 905 (7th Cir. 2001) (disagreeing with *Dillard*); *United States* v. *Stinson*, 943 F.2d 1268 (11th Cir. 1991) (holding that illegal firearm possession by a convicted felon constitutes a crime of violence under the U.S Sentencing Guidelines and disagreeing with the official commentary on the Sentencing Guidelines), *rev'd*, *Stinson* v. *United States*, 508 U.S. 36 (1993) (reversing the Eleventh Circuit because the commentary on the Sentencing Guidelines is authoritative); *Cook* v. *Wiley*, 208 F.3d 1314 (11th Cir. 2000) (holding that the Bureau of Prison's determination that being a felon in possession of a firearm is not a nonviolent offense was reasonable).

The Second Circuit's interpretation of the Bail Reform Act in *Dillard* articulates how a statute addressing substantial risks of violence should include felon-in-possession offenses. The Bail Reform Act defines "crime of violence" in a form similar to the ACCA. The first provision tracks § 924(e)(2)(B)(i), as it looks to whether the offense includes "the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 3156(a)(4)(A). The second part of the definition resembles the residual clause in that it encompasses "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense." § 3156(a)(4)(B). Like the residual clause of the ACCA, § 3156(a)(4)(B) "speaks to offenses that give rise to a possibility, rather than a certainty, that force may be used" and "[f]orce need not be an inevitable concomitant of the offense." *Dillard*, 214 F.3d at 92. Within this framework, Judge Leval reasoned for the Second Circuit that a felon illegally in possession of a firearm poses such a risk.

Dillard recognizes that firearms are "designed for the use of violent physical force" and "are undoubtedly the instrument of choice among the vast majority of violent criminals" because they are "the most potent and efficient instrument for violent crime." *Id.* at 93. "Possession of a gun greatly increases one's ability to inflict harm on others and therefore involves some risk of violence." *Id.*

Dillard determined that the risk entailed by a felon possessing a gun is "substantial" since "the issue arises only with respect to persons possessing a gun notwithstanding the illegality of doing so." *Id.* at 94. As this Court has previously recognized, felon-in-possession

statutes address the fact that felons possessing weapons create an unacceptable risk of violence. *Scarborough* v. *United States*, 431 U.S. 563, 573 (1977) ("The legislative history [of a previous felon-in-possession statute] in its entirety, while brief, further supports the view that Congress sought to rule broadly to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm *without becoming a threat to society*.'" (emphasis added) (citation omitted)). As *Dillard* noted, "[c]riminals who are intent on committing bank robberies, murders, extortions and other crimes of violence characteristically possess guns to aid them in such criminal acts." Bans on firearm possession by felons "seek to protect society by reducing the risk of violence that may result from the possession of guns by persons inclined to crime," so in violating these laws, felons "increase the risk that they may engage in violent acts." 214 F.3d at 93. Research demonstrates the existence of this risk of subsequent violent criminal activity. *See* Katherine A. Vittes et al., *Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership, in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* 65, 66 (Daniel W. Webster & Jon S. Vernick eds., 2013) (noting that convicted felons are much more likely to commit subsequent violent crimes—including homicide—than are non-felons); Caroline Wolf Harlow, *Survey of Inmates in State and Federal Correctional Facilities: Firearm Use by Offenders*, at 10 (2001), *available at* http://bjs.gov/content/pub/pdf/fuo.pdf (finding that a higher percentage of inmates who used guns in their most recent offense compared to those without a gun had a prior incarceration: 55% versus 37%). Statistics confirm that restrictions on firearm possession by felons effectively combat such recidivism. *See* Mona

A. Wright et al., *Effectiveness of Denial of Handgun Purchase to Persons Believed To Be at High Risk for Firearm Violence*, 89 Am. J. Pub. Health 88, 89 (1999) (denying a handgun purchase to those convicted of a felony is associated with a reduction in risk for later criminal activity of approximately 20-30%).

The Seventh Circuit disagreed with *Dillard* on the ground that a "crime that increases the likelihood of a crime of violence need not itself be a crime of violence." *Lane*, 252 F.3d at 907. (holding that felon-in-possession is not a crime of violence under the Bail Reform Act); *but see United States* v. *Green*, 414 F. Supp. 2d 1029, 1032 (N.D. Okla. 2006) (finding that *Dillard* "is, by far, the most well-reasoned and thoroughly researched opinion on the issue"). While that point may be debatable regarding the Bail Reform Act due to the phrase of "in the course of committing the offense," such a narrow view of the violent nature of felon-in-possession offenses would be incompatible with the residual clause's broader view of risk-creation. This Court's jurisprudence has repeatedly recognized that the residual clause encompasses not only the possibility of a crime of violence by the perpetrator, but also justifiable violence by third parties in response to the underlying felony. *See Sykes*, 131 S. Ct. at 2273 (explaining that vehicular flight may lead to physical injury resulting from actions of police while pursuing the offender); *James*, 550 U.S. at 211 (noting that a homeowner might chase a would-be burglar resulting in a violent encounter). Felon-in-possession offenses thus constitute one species of "presumptively lawful" restrictions on gun possession that are within the meaning of "violent felony" under the ACCA residual clause.

One case interpreting the residual clause relied, in part, on state sentencing schemes that did not classify possession by a felon as a violent felony to hold that being a felon in possession of a firearm was not an ACCA violent felony. *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992) ("[M]any states have similar statutes with language that defines terms such as 'crime of violence' or 'violent felony.' These definitions normally include crimes such as burglary and arson; they nowhere include a crime like felon-in-possession."). Since that decision, however, several states have classified felon-in-possession as a "violent felony" in their sentencing schemes. *See* Minn. Stat. Ann. § 609.1095 (West 2014) (classifying Minn. Stat. Ann. § 624.713, which criminalizes firearm possession by a felon, as a "violent crime" for the purposes of sentencing enhancements for repeat offenders); N.Y. Penal Law § 70.02(c) (McKinney) (classifying N.Y. Penal Law § 265.02(5)(ii), which criminalizes firearm possession by certain felons, as a "violent felony offense"); Utah Code Ann. §76-3-203.5(1)(c)(i)(JJ) (West 2014) (classifying Utah Code Ann. § 76-10-503, which criminalizes firearm possession by a felon, as a "violent felony" for the identification of "habitual violent offenders). In fact, two of these states—Minnesota and Utah—were among those cited by *Doe*. 960 F.2d at 225. Of further note, although Petitioner emphasizes that the residual clause refers to "use" and not "possession" of explosives as grounds for excluding all possession offenses, in New York, unlike felon-in-possession crimes, possession of *explosives* is not a "violent felony." *See* N.Y. Penal Law § 265.02(2) (McKinney).

Although Petitioner refers to illegal gun possession as "mere possession," that ignores the fact that in order

to take possession of a gun a convicted felon must evade a network of laws designed to prevent exactly that kind of acquisition. *See* Garen J. Wintemute, *Comprehensive Background Checks: New Evidence and Rethinking "Comprehensive," in Updated Evidence and Policy Developments on Reducing Gun Violence in America* 17, 18 (Daniel W. Webster & Jon S. Vernick eds., 2014) (noting that of felons convicted for firearm-related crimes who were already prohibited persons when they acquired the weapon, only 4.8% bought them from a licensed retailer). A study in 2001 found that 83% of inmates who had a firearm would have been disqualified by federal law from lawfully purchasing the weapon. Further, recidivists were more likely to obtain their weapons "through illegal activities or from the street or a black market source." Harlow, *Firearm Use by Offenders*, at 8 (42% of recidivists and 31% of first timers). The vast majority of "firearm acquisitions made with criminal intent" occur between private parties. Wintemute, *Comprehensive Background Checks*, at 17.

B. Possession In Violation Of Laws Restricting Carrying Guns In Certain Places Or Manners Creates A Serious Potential Risk Of Physical Injury

1. Banning Firearms In Sensitive Locations Aims To Reduce Risks Of Violence

This Court in *Heller* recognized that "laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings" are "presumptively lawful." Federal law and many states forbid bringing a gun into these and similar locations. *See, e.g.*, 18 U.S.C. § 922(q)(2)(A) (school zone); Colo. Rev. Stat. Ann. § 18-12-

105.5 (West 2014) (school zone); Fla. Stat. Ann. § 790.115 (West 2014) (school zone); Fla. Stat. Ann. § 790.145 (West 2014) (pharmacy); Miss. Code Ann. § 97-37-17 (West 2014) (school zone); Tex. Penal Code Ann. § 46.03 (West 2014) (possession in school, polling place, government court, racetrack, or airport). As with prohibited persons possessing firearms, having a firearm in one of these locations creates a risk of gun violence where society has decided none should exist.

For example, guns have been used in an epidemic of school shootings in recent years. There were seventy-four total incidents between December 15, 2012 and June 10, 2014 where a firearm was discharged inside a school building or on school or campus grounds out of which twenty incidents resulted in the death of at least one person and fifty-eight incidents injured at least one person. Everytown for Gun Safety, *Analysis of School Shootings* (Feb. 2014), http://everytown.org/article/schoolshootings/ (last visited Aug. 24, 2014); *see also* Chris Kirk, *Since 1980, 297 People Have Been Killed in School Shootings*, Slate (Dec. 19, 2012), http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/12/sandy_hook_a_chart_of_all_196_fatal_school_shootings_since_1980_map.html (finding that out of 196 school-shooting incidents, 137 were fatal, killing a total of 297 victims, and that each decade had more fatalities than the previous one); Craig Perkins, *National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime* (2003), *available at* http://www.bjs.gov/content/pub/pdf/wuvc01.pdf ("From 1994 through 1999 about 7 in 10 murders at school involved some type of firearm, and approximately 1 in 2 murders at school involved a handgun."). "The carrying of guns at school was found to be strongly associated with

the use of violence and illicit drugs at school." Comm. on Injury & Poison Prevention, *Firearm-Related Injuries*, 105 Pediatrics at 892.

Laws that criminalize weapons possession in school zones respond to the risk of school shootings and other violence. When conforming 18 U.S.C. § 922(q) to this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), Congress explained that "parents may decline to send their children to school" out of "concern about violent crime and gun violence" and that "the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country." Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-371 (1996). Similarly, New York enhanced criminal penalties for those who put "children at risk by, among other dangerous and illegal activities, possessing guns near school grounds." 2013 N.Y. Sess. Laws 1556 (McKinney).

An individual who enters one of these sensitive locations while illegally possessing a gun creates the extreme risk of physical violence posed by firearms. That offender demonstrates preparation to use that weapon, which creates the potential for physical injury. As the spate of school shootings illustrates, the risk of violence associated with this form of illegal possession is substantial. Possession of a weapon in a sensitive location would constitute a "violent felony" for the purposes of the residual clause.

2. Unlawful Concealed Carry Creates A Risk That Guns Will Be Used To Inflict Injury

Violating a restriction on concealed carry of firearms also fits within the residual clause. These statutes target the risk that "persons becoming suddenly angered, and having such a weapon in their pocket, would be likely to use it, which in their sober moments they would not have done, and which could not have been done had not the weapon been upon their person." *State* v. *Chippey*, 33 A. 438 (Del. Ct. Gen. Sess. 1892). Although some courts have concluded that violating a concealed carry regulation is not a violent felony, *see Moore* v. *Warden, FCC Coleman-Medium*, No. 10-12424, 2014 WL 2599762 (11th Cir. June 10, 2014), *abrogating United States* v. *Hall*, 77 F.3d 398 (11th Cir. 1996), the risks associated with illegal concealed carry actually bring this genre of offenses within the crimes address by the ACCA.

Studies have found that even increases in legal concealed carry are associated with increases in gun violence and crime. John J. Donohue, *The Impact of Concealed-Carry Laws, in Evaluating Gun Policy Effects on Crime and Violence* 289, 320 (2003) (noting that data suggests that the clear majority of states experience *increases* in violent crime, murder, and robbery when shall-issue laws are adopted); Hashem Dezhbakhsh & Paul Rubin, *Lives Saved or Lives Lost? The Effects of Concealed-Handgun Laws on Crime*, 88 Am. Econ. Rev. 473 (1998) (interpreting data to find that many states experience increases in robbery after concealed carry laws are enacted). In fact, one study found that during the time period examined, "[t]he only group of states to have experienced a substantial drop in robbery

(albeit one punctuated by two sharp upturns) was the group of twenty-two states that never adopted shall-issue legislation." Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193, 1214 (2003).

Some legislatures may choose to accept the risks created by concealed carry when regulating firearm possession. The decision to defy a legislative restriction of concealed carry, however, demonstrates the offender's willingness to create those risks. That kind of conduct indicates the greater likelihood that the offender would pull the trigger in the future.

C. Bans On Sawed-Off Shotguns Are One Example Of Laws Outlawing Particularly Dangerous Types Of Firearms

The offense at issue in this case, a Minnesota law criminalizing possession of a sawed-off shotgun, belongs to a third form of possession offenses: restrictions on particularly dangerous weapons. There "is a consensus among the researchers in this area that the type of weapon matters." Cook, *Technology of Personal Violence*, 14 Crime & Just. at 24 ("Whether a shooting victim lives or dies depends in part on the length of the gun barrel and the size of the bullet."). In addition to federal law, which requires registration of a number of different particularly dangerous weapons, state laws often outlaw possession of firearms deemed to pose impermissible risks of criminal violence because they have no other purpose. *See, e.g.*, Ark. Code Ann. § 5-73-104 (West 2014) (bomb, machine gun, sawed-off shotgun or rifle, firearm specially made or specially adopted for silent discharge, metal knuckles,

or other implement for infliction of serious physical injury or death); Colo. Rev. Stat. Ann. § 18-12-102 (West 2014) (firearm silencer, machine gun, short shotgun, short rifle, or ballistic knife); Fla. Stat. Ann. § 790.221 (West 2014) (short-barreled rifle, short-barreled shotgun, machine gun); Mass. Gen. Laws Ann. ch. 269, § 10 (West 2014) (criminalizing possession of machine guns and sawed off shotguns along with other dangerous weapons); 18 Pa. Cons. Stat. § 908 (2014) (criminalizing possession of various offensive weapons, with an exception for weapons—other than bombs, grenades, and incendiary devices—that have been registered in compliance with the National Firearms Act, 26 U.S.C. § 5801 et seq.); Tex. Penal Code Ann. § 46.05 (West 2014) (explosive weapon, machine gun, short-barrel firearm, silencer, knuckles, armor piercing ammunition, chemical dispensing device, zip gun, tire deflation device). In 1998, when outlawing "disguised guns," the New York legislature recognized "these guns serve no legitimate sporting or law enforcement purpose and should be banned" because they "compromise security at airports, courtrooms or other places that use metal detectors." 1998 N.Y. Sess. Laws 1799 (McKinney). Outlawing specific, particularly dangerous firearms represents a legislative judgment that they present too substantial a risk of criminal violence.

CONCLUSION

The illegal possession of firearms—by persons deemed too dangerous to possess guns, in places where the risks of gun possession are too great, or possession of unusually dangerous guns—creates grave and unacceptable risks of death and injury. Despite the Petitioner's emphasis on these offenses as involving "mere" possession, gun possession offenses include an element, such as the identity of the offender or the place where the weapon was carried, in addition to the possession. Each of these elements describes a factor that transforms the potential for physical injury inherent in firearms into a "substantial potential risk of physical injury." This Court should find that a firearm possession offense—including illegally possessing a sawed-off shotgun—is a violent felony under the Armed Career Criminal Act.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

SAMUEL JAMES JOHNSON, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari to the
U.S. Court of Appeals for the Eight Circuit

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Inc., Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner

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INTEREST OF *AMICI CURIAE*[1]

Gun Owners of America, Inc., and The Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3).

These *amici* were established, *inter alia*, for educational purposes related to participation in the public policy process, including programs to conduct research and to inform and educate the public on important issues of national concern, the proper construction of state and federal constitutions and statutes, questions related to human and civil rights secured by law, and related issues. Each organization has filed many *amicus curiae* briefs in this Court and other federal and state courts.

SUMMARY OF ARGUMENT

After accepting Petitioner Samuel Johnson's guilty plea to the federal charge of possession of a firearm by a convicted felon, the U.S. District Court sentenced

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Johnson to a mandatory minimum sentence of 180 months (15 years) under the Armed Career Criminal Act ("ACCA"). But for Eighth Circuit precedent that Johnson's constructive possession of a short-barreled shotgun qualified as a conviction of a "violent felony" under the ACCA, the trial judge would have imposed a sentence only half, or at most two thirds, of the mandated minimum.

The threshold issue presented on this appeal is one of statutory construction of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), which defines a violent felony to be "burglary, arson, extortion, involves use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another." Applying the basic rule of construction that the words of a statute are to be given their ordinary meaning, "conduct" does not comprehend mere or constructive possession. Applying further the whole text canon of construction, "burglary, arson, extortion and use of explosives" are all conduct-based, requiring proof not only of conduct, but of violent and aggressive actions, which are a far cry from passive possession. Finally, applying the interpretive principle of *expressio unis est exclusio alterius,* the statutory specification of the "use of explosives," the closest analog of the four enumerated offenses to Johnson's crime of conviction, absolutely precludes a crime that requires only proof of mere or constructive possession of any firearm, including a short-barreled shotgun.

With regard to the secondary issue — whether Johnson's violation of the crime of possession of a short-barreled shotgun "presents a serious potential

risk of physical injury to another" — the Eighth Circuit ruling that it does is based upon a demonstrably false premise that short-barreled shotguns are inherently dangerous, having the singular purpose of violent criminal activity. However, Congress has provided that a person may lawfully possess a short-barreled shotgun if properly registered under the National Firearms Act ("NFA"). Also, shotguns generally, and short-barreled ones as well, have a variety of lawful purposes, including self defense in the home. Short-barreled shotguns certainly do not pose an inherent risk of serious physical injury to another.

STATEMENT

This case presents yet another issue of statutory construction of the mandatory minimum sentence prescribed under the 1984 Armed Career Criminal Act, and it comes to this Court at a time of wide-spread public debate over the consequences that such sentencing policy and practices have had for the administration of criminal justice. There is increasing dissatisfaction with the practice of mandatory minimum sentences being voiced by and before all three branches of the federal government.[2] Chief among the reasons given for eliminating mandatory minimums altogether is the contention that they have

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[2] *See, e.g.*, E. Luna, "Mandatory Minimum Sentencing Provisions Under Federal Law," Testimony before the United States Sentencing Commission (May 27, 2010) http://www.cato.org/publications/congressional-testimony/mandatory-minimum-sentencing-provisions-under-federal-law.

vested enormous discretionary power in federal prosecutors and, at the same time, withdrawn from trial judges any sentencing discretion whatsoever — all without reducing disparities among sentences or accomplishing anything more than to contribute to the overcrowding of federal prisons.[3] This appeal appears to present just such a case.

Induced by a several-count indictment, Johnson entered into a plea bargain, hoping to persuade the trial court that the mandatory minimum sentence provision in the ACCA did not apply because the third predicate crime of which he had been convicted was not a "violent felony" under the ACCA. At sentencing the government prevailed, as the district court sentenced "Mr. Johnson to 180 months in prison, the statutory mandatory minimum." Brief for the Petitioner ("Pet. Br.") at 5. Before imposing the sentence, however, the court stated:

> I think 180 months is too heavy of a sentence in this case. But I take an oath to follow the law as I see it and I've made my decision in that regard. But as I say, I impose the sentence reluctantly because I think a sentence of half that or two-thirds of that would be more than sufficient to qualify. But as I say, I do not have

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[3] *See, e.g.*, E. Bernick & P. Larkin, "Reconsidering Mandatory Minimum Sentences: The Arguments For and Against Potential Reforms," The Heritage Foundation Legal Memorandum #114 (Feb. 10, 2014) http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms.

> any choice in the matter, at least as I view it. [*Id.*]

The trial court believed itself bound by Eighth Circuit precedent that the Minnesota statute criminalizing possession of a short-barreled shotgun was a "violent felony" and, thus, Johnson was required to receive the prescribed mandatory minimum. But as *amici* argue in Part I, the Eighth Circuit ruling precedents are inconsistent with a careful reading of the statutory prerequisite that to be counted as a violent felony the predicate crime must involve active and aggressive "conduct," such as actual employment, not mere possession, of the forbidden firearm. Further, as we argue in Part II, the Eighth Circuit rule that possession of a short-barreled shotgun is premised upon an erroneous assumption that such shotguns have no lawful purpose when, in fact, Congress has sanctioned ownership of such firearms under the National Firearms Act. Additionally, such shotguns have a variety of lawful purposes, including self-defense in the home. Finally, although not developed herein, these *amici* would urge this Court to apply the rule of lenity, as argued by Petitioner's opening brief. Pet. Br. at 47-50.

ARGUMENT

This case concerns whether the crime of possession of a short-barreled shotgun is a "violent felony" for purposes of sentence enhancement under 18 U.S.C. § 924(e)(1). The question raised in this case concerns the meaning of "violent felony," as that term appears in § 924(e)(2)(B)(ii), which states that a "violent felony"

is "burglary, arson, or extortion, involves use of explosives, **or otherwise involves conduct that presents a serious potential risk of physical injury to another**." (Emphasis added.) Because the crime of possession of a short-barreled shotgun is not among the four named offenses, the specific question in this case is whether the crime is nevertheless a violent felony because it constitutes a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

Four times previously, this Court addressed whether the statute in question was triggered by conduct that "**presents a serious potential risk of physical injury to another**." *See* James v. United States, 550 U.S. 192 (2007); Begay v. United States, 553 U.S. 137 (2008); Chambers v. United States, 555 U.S. 122 (2009); and Sykes v. United States, 131 S.Ct. 2267 (2011). Importantly, in each of these cases there was no question but that the crimes of conviction involved "conduct." *See* James at 196 (attempted burglary); Begay at 140 (DUI); Chambers at 126 (escape); and Sykes at 2273 (vehicle flight). The only question addressed in each case was whether the "conduct" specified in the predicate statute "present[ed] a serious potential risk of physical injury to another."

Unlike previous cases, this case raises the threshold question whether the crime of conviction involves "conduct" as that term appears in § 924(e)(2)(B)(ii). If the crime does not involve conduct, then it cannot be a "violent felony" regardless of whether the government can establish that the

crime presents a serious risk of physical injury to another.

The government would have this Court adopt the view that a statute, which expressly provides that "use," rather than mere possession, of explosives to constitute a violent felony, should be applied to extend to constructive possession of a certain type of firearm. This Court instead should adopt the view of the Sixth and Eleventh Circuits rejecting the illogic of that argument.

I. "CONDUCT" AS THAT TERM APPEARS IN 18 U.S.C. § 924(e)(2)(B)(ii) DOES NOT COMPREHEND THE CRIME OF POSSESSION OF A SHORT-BARRELED SHOTGUN.

A. Johnson's Conviction Was Based upon Mere Possession.

The Minnesota statute at issue here defines the crime of conviction to be "whoever owns, possesses, or operates a ... short-barreled shotgun." Minnesota Statute § 609.67, sub. 2. According to the record, Johnson's conviction under this statute was secured by evidence of the discovery of a "sawed-off shotgun" in a bag in the backseat of a car in which Johnson was a front seat passenger. *See* Petition for Writ of Certiorari ("Pet. Cert.") at 13. Thus, facts underlying Johnson's conviction appear similar to the evidence of "passive possession" as in other cases prosecuted under the Minnesota and similar statutes. *See* Pet. Br. at 21 and n.5. The initial question, then, is

whether a passive possession of a short-barreled is "conduct" within the meaning of 18 U.S.C. § 924(e)(2)(B)(ii). If such passive possession is not "conduct," then this Court need not reach the question whether the crime of possession of a short-barreled shotgun under the Minnesota statute is a crime "that presents a serious potential risk of physical injury to another."

B. The Ordinary Meaning of Conduct Does Not Comprehend Mere Possession.

In petitioner's opening brief, Johnson contends that "conduct," as it appears in § 924(e)(2)(B)(ii), does not comprehend "a crime of mere possession and nothing more, which distinguishes it entirely from the enumerated offenses and from inclusion as a violent felony." Pet. Br. at 15. *See also id.* at 18-19, 22.

There is no more basic rule of statutory construction than "[w]ords are to be understood in their ordinary, everyday meanings." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts, p. 69 (West: 2012). According to its ordinary meaning, "conduct" is "the act, manner, or process of carrying out (as a task) or carrying forward (as a business)." Webster's 1962 International Dictionary at 473. Possession, "both in common speech and in legal terminology [is] ambiguous[,] interchangeably used to describe [i] actual possession and [ii] constructive possession." National Safe Deposit Co. v. Stead, 232 U.S. 58, 67 (1914). Although the actual exercise of possession, such as holding a firearm, may constitute conduct, the Minnesota statute prohibiting possession

of a short-barreled shotgun does not — as was true in this case — require proof of actual physical custody, *i.e.*, "possession in fact."[4] Rather, as the court of appeals ruled below, "Johnson's offense is not meaningfully distinguishable from the one in *Lillard*,"[5] in which, under a comparable Nebraska statute, Lillard was convicted for having "constructively possessed a short shotgun." *See* United States v. Lillard, 685 F.3d 773, 776, n.3 (8th Cir. 2012).

Historically, constructive possession does not require proof of any conduct whatsoever. *See, e.g.*, W. Clark, Handbook on Criminal Law, § 95, pp. 323-24 (West: 1915). Rather it is a legal construct that extends possession to situations where a person has no hands-on custody, but has knowledge plus the ability to control an object even though not in physical contact with it. *See, e.g.*, United States v. DeRose, 74 F.3d 1177 (11th Cir. 1996). Thus, according to the ordinary meaning of the term "conduct," Johnson's conviction for constructive possession of a short-barreled shotgun was not based upon any act, manner, or process of carrying out any task or carrying forward any activity, *i.e.*, any "conduct."

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[4] Stead, 232 U.S. at 68.

[5] United States v. Johnson, 526 Fed. Appx. 708, 711 (8th Cir. 2013).

C. Contextually, Conduct Does Not Comprehend Mere Possession.

A requirement of actual possession, not present here, is reinforced by statutory context.[6] 18 U.S.C. § 924(e)(2)(B)(ii) reads in pertinent part: "the term 'violent felony' means any crime ... if committed by an adult, that — is [i] burglary, [ii] arson, or [iii] extortion, [iv] involves use of explosives, or [v] otherwise involves conduct that presents a serious potential risk of physical injury to another." As one court of appeals has observed, "[e]ach of these [four] crimes involves affirmative and active conduct." United States v. Flores, 477 F.3d 431, 436 (6th Cir. 1994).

"More tellingly," this same court noted that the "statute provides that the *use* — rather than the possession — of explosives is conduct that rises to the level of a violent felony." *Id.* If the statute is clear that mere possession of explosives such as a box of dynamite[7] cannot justify a sentencing enhancement, it would be illogical to conclude mere constructive possession of a single short-barreled shotgun was

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[6] The "whole-text canon .... calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Reading Law at 167.

[7] The saying is overused — but nonetheless true — that "guns don't kill people, people kill people." It is inconceivable that, if mere possession of a box of dynamite (potentially unstable and which literally could detonate on its own) does not qualify as a violent felony, that mere possession of a short-barreled shotgun (which by itself is a danger to no one) could qualify.

intended to trigger the 15-year mandatory minimum sentence.

Additionally, another court of appeals has recognized that "settled principles of statutory construction require us to interpret the provision in § 924(e)(2)(B)(ii) regarding conduct presenting a 'serious potential risk of physical injury' in light of the language that precedes it":

> [The four] specifically enumerat[ed] offenses each manifest affirmative, overt and active conduct in which the danger posed to others extends beyond the mere possession of a weapon .... Most significantly, the statute requires that the *use* — rather than possession — of explosives gives rise to a potential violent felony. It is unlikely that in enacting § 924(e). Congress intended that the possession of a firearm be deemed a violent felony, while the possession of explosives would not be so categorized. [United States v. Oliver, 20 F.3d 415, 418 (11th Cir. 1994).]

Similarly, in Begay v. United States, 553 U.S. 137 (2008), this Court ruled that a conviction for driving under the influence of alcohol was not a violent felony because:

> DUI differs from the example crimes — burglary, arson, extortion, and crimes involving the use of explosives — in at least one pertinent, and important, respect. The listed crimes all typically involve purposeful, "violent," and

"aggressive" **conduct.** [*Id.* at 144-45 (emphasis added).]

On this basis, this Court ruled that a crime that "amounts to a form of inaction [is] a far cry from the 'purposeful, "violent," and "aggressive" conduct' potentially at issue when an offender **uses** explosives against property...." Chambers v. United States, 555 U.S. 122, 128 (2009) (emphasis added). The same logic governs here.

D. Measured by Its Closest Analog, "Use" of Explosives, Conduct Does Not Comprehend Possession.

In James v. United States, this Court concluded that "[t]he specific offenses enumerated in clause (ii) provide one baseline from which to measure whether other similar conduct 'otherwise ... presents a serious potential risk of physical injury.'" *Id.* 550 U.S. at 203. Thus, the Court decided that it "can ask whether the risk posed by [the predicate crime] is comparable to that posed by its closest analog." *Id.* *See also* Sykes at 2273.

In this case, the closest analog to the predicate crime of possession of a short-barreled shotgun is the phrase "use of explosives." Employing that analog, it is clear that **possession** of any type of firearm would not be covered, it being a far cry from "**use**" of explosives.

Indeed, interpreting 18 U.S.C. § 924(c)(1)(A) — a mandatory minimum sentencing statute companion to

18 U.S.C § 924(e) — this Court construed "use" of a firearm to "require[] evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." Bailey v. United States, 516 U.S. 137, 143 (1995). It was not enough, the Bailey Court ruled, for the government to have proved that the firearm was "accessible and proximate" to the defendant. *See id.* at 138-39. Instead, the Court reasoned that "use" required proof of "active employment," **not** "mere possession." *Id.* at 143-44.

Likewise, since the government would be required to prove more than mere possession of explosives with accessibility and proximity in order to establish "use of explosives" to be a violent felony, *a fortiori* mere possession of a short-barreled shotgun, even if accessible and proximate, would not constitute a violent felony. In neither case would such a crime require proof of "conduct" within the meaning of 18 U.S.C. § 924(e)(2)(B)(ii).

Had Congress intended that mere possession of explosives be classified as a violent felony, it would have omitted "conduct" entirely from § 924(e)(2)(B)(ii) — so that it would have read "or otherwise presents a serious potential risk of physical injury to another." Such a reading would violate the surplusage canon that requires, if possible, every word or provision is to be given effect. *See* Reading Law at 174. Moreover, by the phrase, "involves conduct that," Congress intended to trigger the negative implication that only those crimes that are conduct-based are eligible to be

classified as a violent felony — *expressio unius est exclusio alterius*. *See* Reading Law at 107, *et seq.*

Because the crime of mere possession of a short-barreled shotgun does not require any proof of actual conduct, the crime does not meet the threshold requirement of conduct. Therefore, the crime is not even eligible to be classified as a violent felony. Thus, this Court cannot find such possession to trigger the statute even if it adopts the government's speculation as to whether a short-barreled shotgun necessarily presents a serious potential risk of physical injury to another.

II. A SHORT-BARRELED SHOTGUN IS DESIGNED AND REGULARLY USED FOR A VARIETY OF LAWFUL PURPOSES.

Relying on United States v. Lillard, 685 F.3d 773, 777 (8th Cir. 2012), the court of appeals below found that possession of a short-barreled shotgun "as a **categorical** matter ... presents a serious potential risk of physical injury to another" and, thus, that it qualifies as a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii). Johnson at 711. Lillard, in turn, was based on the assumption that short-barreled shotguns are "inherently dangerous because they are not useful '**except for violent and criminal purposes.**'" *Id.* at 776 (emphasis added). This assumption is demonstrably untrue.

Thousands of Americans legally own short-barreled shotguns which are registered with the U.S. Department of the Treasury pursuant to the National

Firearms Act. *See* Pet. Br. at 25-29. The government's untenable position is that Congress simultaneously sanctions the ownership and possession of a category of weapons that it has determined are intended **only** for "violent and criminal purposes."[8]

Certainly, there was no basis for the Eighth Circuit to assert without qualification whatsoever that "[p]ossession of a short shotgun creates an extreme 'likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.'" Lillard at 777. Does this statement apply to those who **lawfully** own short-barreled shotguns under the NFA? Does it apply to American citizens who illegally possess a short-barreled shotgun — but have never committed any other crime? Does the statement apply to police officers and military personnel who use short-barreled shotguns in the course of their employment? Does the simple possession of a short-barreled shotgun somehow transform a person into one who is extremely likely to become violent? The Eighth Circuit simply failed to consider the consequence of its view that anyone in mere possession of a short-barreled shotgun is a potential cold-blooded killer.

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[8] Having federal paperwork to accompany a short-barreled shotgun, in and of itself, does not decrease or eliminate the risk of violence associated with the short-barreled shotgun, since it is only a person, not the short-barreled shotgun, that has the capacity to be violent. A short-barreled shotgun sitting in the corner is not inherently more dangerous than a short-barreled shotgun sitting in the corner with an ATF tax stamp lying next to it.

To the contrary, short-barreled shotguns have many legitimate, lawful uses.

A. The Shotgun Is the Self-Defense Weapon of Choice for Millions of Americans.

Second only to the handgun,[9] the shotgun is no doubt the most popular weapon chosen by Americans for self-defense in the home. The reasons for this are myriad, ranging from the power, to the versatility of ammunition, to the simplicity of this type of firearm.[10]

The shotgun is undoubtedly a powerful weapon. Federal law generally prohibits the possession of firearms with barrels that are more than 0.50 inches wide. *See* 18 U.S.C. § 921(a)(4)(B). However, shotguns are expressly exempted from this prohibition, even though the diameter of, for example, the most commonly owned size of shotgun, 12 gauge, is 0.73 inches.

The power of the commonly owned shotgun is illustrated by comparison to other common calibers of firearms, such as the .45 ACP (the largest handgun calibers typically used for self defense) and the .308

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[9] *See* District of Columbia v. Heller, 554 U.S. 570, 629 (2008) ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.").

[10] *See* Firearms Tactical Institute, Tactical Briefs #10, Oct. 1998, http://www.firearmstactical.com/briefs10.htm.

Winchester (one of the largest rifle calibers typically used for self defense).

First, a 12 gauge slug can weigh as much as 1 3/8 ounce.[11] By comparison, the projectile in the .45 ACP is around 230 grains (0.53 oz) and the .308 is around 150 grains (0.34 oz).

Second, the muzzle energy generated by a 12 gauge shotgun slug can be as much as 4700 foot pounds, compared to 400-500 foot pounds from the .45 ACP and about 2600 foot pounds from the .308.

Not only are shotguns powerful weapons, the most popular models are pump action, making it very simple to operate the action, even in the highly stressful circumstances when the need for self-defense arises. The simplicity of the action also contributes to making shotguns immensely reliable. Indeed, it is well known that some criminal encounters often are deterred by the terrifying and unmistakable sound of the simple racking of the slide of a pump action shotgun — with or without the ability to see the weapon. Such deterrent effect cannot be quantified, but should not be underestimated.

Many shotgun models have a simple bead sight, which is highly durable and more than sufficient in the close quarters and short ranges that it would be used in home defense situations.

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[11] There is a plethora of different types of lawful projectiles that can be fired from a shotgun, *e.g.*, buckshot, birdshot.

There is a consensus among many that the shotgun should be considered the weapon of choice for self-defense and home protection. Indeed, even zealous gun-control advocate Vice President Joe Biden lobbying for bans on so-called "assault weapons"[12] like AR-15 and AK-47 semi-automatic rifles, has counseled his fellow citizens, "If you want to protect yourself ... buy a shotgun. Buy a shotgun."[13]

B. Short-Barreled Shotguns Are Particularly Useful for Self-Defense within the Home.

A short-barreled shotgun is defined under federal law as one with a barrel length under 18 inches. Thus, by definition, short-barreled shotguns are identical to legal shotguns, only with shorter barrels than on other shotguns. Shorter barrel length translates into less mass, and thus into less weight. In the most popular of shotguns with tubular magazines that reside below the barrel, a shorter barrel also means reduced capacity of the magazine, which also translates into less weight. A fully loaded short-barreled shotgun could weigh a pound less than a fully loaded shotgun with a longer barrel and longer magazine containing more rounds.

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[12] The term "assault weapons" is a politically charged misnomer.

[13] *See* "Open for Questions: Vice President Biden on Reducing Gun Violence," Feb. 13, 2013, https://www.youtube.com/watch?v=Ech3Krw8FGU, excerpted at https://www.youtube.com/watch?v=HHZ7zXLvOkY.

Shotguns are relatively heavy weapons, especially when fully loaded, and are often much heavier than rifles such as the AR-15, especially when fully loaded in tubular magazines that rest forward near the front of the shotgun, making its center of balance further forward than, say, an AR-15. Basic physics says that the further away from the fulcrum (the hands that hold it) that weight gets, the more of a load or strain it places on the fulcrum (the shooter's arms). Therefore, the longer and heavier the shotgun, the more it can pose logistical problems for persons of small stature, lesser strength, or physical disability. By employing a short-barreled shotgun — weighing significantly less and carrying far less mass forward for the user — it is far easier for many people to effectively wield a short-barreled shotgun. This attribute is critically important in self-defense situations, when the ability to effectively manipulate a weapon is essential.

Moreover, when used for self-defense in the home, a shorter barrel on a shotgun increases the mobility of the user. Almost universally, when evaluating a firearm for use in the home, a shorter barrel is preferred over a longer one. It is self-evident that while attempting to maneuver through one's home without bumping into walls and doors, a shorter barrel is superior than a longer one. Additionally, the shorter barrel decreases the chances that the firearm may be grabbed by an assailant and its muzzle reoriented, rendering it ineffective. A short-barreled shotgun is thus more easily employed for self defense not only in the home, but also in one's place of business or in one's vehicle, or elsewhere.

In short, there are a variety of perfectly understandable and legitimate reasons that a person would prefer a short-barreled shotgun for use as a self-defense weapon in the home.

C. The Arbitrary Distinction of a Short-Barreled Shotgun Defies Determinations of Dangerousness.

It is illogical to believe a shotgun with a 17.9 inch barrel has only criminal application while, at the same time, federal law recognizes a shotgun with a barrel of 18.1 inches to be fully lawful. Although the arbitrarily chosen length of 18 inches defines what is permitted and what is not, it makes no sense to argue — as the Eighth Circuit has — that the uses for shorter barreled shotguns are "categorically" and inherently dangerous and illegal simply based on barrel length.

Lastly, pistols chambered in a shotgun caliber[14] are widely used by Americans for lawful purposes. The fact that their ownership is lawful exposes the illogic of the Eighth Circuit's assertion that (i) short-barreled shotguns have no lawful purposes, but (ii) handguns chambered for shotgun shells which are shorter, and standard shotguns which are longer, both have lawful uses, neither carrying any presumption of a tendency to violence.

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[14] *See, e.g.*, Taurus' "Judge" and Smith & Wesson's "The Governor" revolvers chambered for .410 shotshells.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

SAMUEL JAMES JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Whether mere possession of a short-barreled shotgun should be treated as a violent felony under the Armed Career Criminal Act.

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NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, NATIONAL INCIDENT-BASED REPORTING SYSTEM, 2010: EXTRACT FILES (2010), *available at* https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/33601.....16

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Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012) 10

STATEMENT OF INTEREST OF *AMICI CURIAE*

Evan Tsen Lee, Stephen Rushin, and Eric A. Johnson are law professors who teach and write about criminal law, criminal procedure, and punishment.[1] They have an interest in the sound development of law in these fields.

SUMMARY OF ARGUMENT

This brief presents empirical data that bears on the question of whether possession of a short-barreled shotgun presents "serious potential risk of injury to another" under the so-called residual clause of the Armed Career Criminal Act (ACCA). 18 U.S.C. § 922(e)(2)(B)(ii). In addressing whether a particular felony falls under the residual clause, this Court often

[1] All parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The University of Illinois at Urbana-Champaign and the University of California, Hastings College of Law provided financial support for activities related to faculty members' research. This support helped defray the cost of preparing and filing this brief. Neither the University of Illinois at Urbana-Champaign nor the University of California, Hastings College of Law are signatories to this brief. The views expressed in this brief are those of the *amici curiae*. Otherwise, pursuant to this Court's Rule 37.6, the *amici curiae* note that no person or entity other than the *amici* curiae has made a monetary contribution intended to fund the preparation or submission of this brief.

asks whether the offense is at least as dangerous as the four felonies explicitly listed in the ACCA – burglary, arson, extortion, and use of explosives. *See, e.g., Sykes v. United States*, 131 S. Ct. 2267, 2274-75 (2011) (comparing the risk of injury posed by vehicular flight from a peace officer with that posed by burglary and arson). If the risk posed by the felony "outstrip[s] the dangers of offenses enumerated in" the residual clause, then the felony may qualify under the ACCA. *Id.* at 2274; *see also James v. United States*, 550 U.S. 192, 203 (2007) (stating that enumerated offenses from the ACCA provide a "baseline against which to measure the degree of risk" for nonenumerated offenses).

The adoption of this standard has presented a methodological challenge. How should the Court measure the comparative risk posed by different felonies? In multiple cases, the Court has turned to statistical evidence. *See, e.g., Chambers v. United States*, 555 U.S. 122, 129 (2009) (asserting that, in some cases, statistical evidence "helps provide a conclusion" about the risk of a crime); *Sykes*, 131 S. Ct. at 2274 (asserting that statistics, although not dispositive, are useful to "confirm commonsense conclusions").

The statistical evidence presented in this brief shows that weapons law violations are more frequently associated with physical injury than are burglary, arson, or extortion, as those offenses are defined in the National Incident-Based Reporting System (NIBRS). Admittedly, this sort of statistical evidence

is not dispositive, as "data in and of themselves are incapable of interpreting a statute." Evan Tsen Lee, Lynn A. Addington & Stephen Rushin, *Which Felonies Pose a "Serious Potential Risk of Injury" for Federal Sentencing Purposes?*, 26 Fed. Sentencing Rep. 118 (2013). To the extent that the Court considers statistics in the present case,[3] however, the best available evidence weighs in favor of finding that possession of a short-barreled shotgun qualifies under the residual clause of the ACCA. *Amici* make two primary arguments:

1. NIBRS provides the best available database for measuring whether a felony presents a serious potential risk of injury to another. NIBRS is the largest available database that contains records on injuries associated with criminal offenses. *Id.* at 119. NIBRS uses uniform offense definitions allowing researchers to compare the risk posed by different categories of criminal offenses across jurisdictions. *Id.*

2. According to NIBRS, weapons law violations, including possession of a short-barreled shotgun, are associated with injuries in a larger percentage of incidents than blackmail, arson, or burglary. *Id.* (Table 1). *Amici* acknowledge that mere possession of an unlawful weapon cannot, in and of itself, "cause" an injury. But the NIBRS data shows that when a

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[3] *Amici* take no position on the qualitative determination as to whether possession of a short-barreled shotgun constitutes "purposeful, violent, and aggressive" conduct. *See Begay v. United States*, 553 U.S. 137, 145 (2008).

criminal incident involves some weapons law violation, that incident is more likely to involve a physical injury than incidents involving blackmail, arson, or burglary.[3] The data further indicates that, in the cases that involve weapons law violations and injuries, it is a weapon that almost always inflicts the injury. This evidence supports the conclusion that weapons law violations pose a higher potential risk of injury than do offenses like blackmail, arson, and burglary.

Amici acknowledge that the NIBRS dataset is not perfect for the task at hand. The data somewhat over-represent smaller police departments. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 119. NIBRS also contains no specific crime category for the possession of a short-barreled shotgun. *Amici* claim only that weapons law violations generally – that is, unlawful possession of guns, knives, and explosives – are associated with a higher percentage of injuries than three of the four specifically enumerated violent felonies in the ACCA. With these caveats, *Amici* contend that the NIBRS data weigh in favor of Respondent's position that the residual clause covers possession of a short-barreled shotgun.

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[3] This is because weapons law violations commonly co-occur with inherently dangerous offenses that involve the use or threatened use of physical force against another, including assault and robbery. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 120 n.27.

ARGUMENT

I. The National Incident-Based Reporting System (NIBRS) provides the best available database for measuring whether a felony presents a serious potential risk of physical injury to another

Comparative statistical analysis has been an important component in this Court's determination of which felonies fall within the ACCA's residual clause. In *James v. United States*, 550 U.S. 192, 206-07 (2007), the Court approvingly cited statistics on the risk posed by different felony offenses. The Court ultimately concluded in *James* that attempted burglary poses a risk of injury similar to, if not greater than, the risk of injury associated with completed burglary. *Id.* Because the risks associated with attempted burglary approximated one of the enumerated violent felonies under the ACCA, its inclusion under the residual clause was appropriate.

Similarly, in *Chambers v. United States*, the Court consulted statistics to determine the risk posed by a criminal's failure to report to a penal institution. 555 U.S. at 129. In holding that this crime did not fall under the ACCA's residual clause, the Court favorably cited a statistical study done by the United States Sentencing Commission. *Id.* The recent case of *Sykes v. United States* also relied on comparative statistics to help determine whether a felony falls within the residual clause. 131 S. Ct. at 2274-75. *Sykes* involved an individual who had previously been convicted of fleeing a police officer in a motor vehicle. *Id.* at 2270.

In holding that offense covered by the residual clause, the Court compared the rate of injuries associated with police pursuits to the injury rates for the enumerated offenses of burglary and arson. *Id.* at 2274-75.

These cases establish the importance and relevance of comparative statistical analysis in applying the ACCA residual clause. In light of these precedents, *Amici* argue that NIBRS data hold considerable probative value. Indeed, *Amici* contend that NIBRS provides the best available database for helping to determine whether certain felonies pose a serious potential risk of physical injury to another.

The Federal Bureau of Investigation (FBI) collects crime data from law enforcement agencies across the country each year as part of the Uniform Crime Reports (UCR). Lee et al., *supra*, 26 Fed. Sentencing Rep. at 118. Historically, the UCR only recorded aggregate-level information on the prevalence of eight major criminal offenses – homicide, aggravated assault, rape, burglary, larceny, arson, and auto-theft. *Id.* With the exception of homicides, these UCR records provided no details about the circumstances surrounding each offense. *Id.* Recently, though, the FBI has begun collecting additional crime data through the database known as NIBRS. *Id.* This new system requests information from local law enforcement agencies on 46 different offense categories. *Id.* NIBRS also groups together criminal offenses into incident-level data. *Id.* at 118-19. This means that if an offender commits two different offenses as

part of a single criminal incident, NIBRS groups these two offenses together for data analysis purposes. For example, suppose that an offender commits an assault in the course of committing a burglary. Traditionally, the UCR would register that event as two separate criminal events. By contrast, NIBRS groups together these two criminal offenses into a single incident. Police agencies that use NIBRS also report information on the circumstances of each criminal incident, including whether the incident resulted in any physical injuries to victims.[4]

NIBRS represents a major advance in cross-sectional, national crime statistics. It better reflects the reality of crime by measuring it in a more holistic way – by incident. Actors frequently commit multiple crimes in the same incident, and offenses committed as part of the same incident usually bear a significant relationship to one another. From an incident-based perspective, it becomes clear that some offenses are commonly associated with other offenses.

At the same time, NIBRS has two main weaknesses as a source of data for studying the association

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[4] If the incident created an injury, NIBRS departments categorize that injury by type and severity. Available NIBRS injury categories include: apparent minor injury, apparent broken bones, other major injury, possible internal injury, loss of teeth, severe laceration, and unconsciousness. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 119. If the incident led to no injuries, departments select "none" in the injury category. *Id.* The study treated all injuries the same, regardless of severity.

of felonies with injuries on a nationwide basis. First, the NIBRS database is not perfectly representative of the United States. Participation in NIBRS is voluntary and NIBRS agencies must undergo a lengthy certification process. *Id.* at 119. The sample of agencies in the NIBRS database over-represents smaller population areas. *Id.* Fairfax County, Virginia, is the only agency to report statistics to the NIBRS database that serves a population of more than one million residents. *Id.* Thus, one must consider whether this overrepresentation of smaller police agencies skews the data in any systematic way.

Second, although NIBRS greatly expands on the number of offense categories traditionally used in the UCR, it still cannot capture every single offense category. *Id.* For example, NIBRS has no category for possession of a short-barreled shotgun. The closest analogous category is an aggregation of offenses titled "weapons law violations." NIBRS defines weapons law violations as "laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons." *Id.* at 125. The NIBRS definition of weapons law violations includes possession of a short-barreled shotgun, but it also includes other weapons-related offenses. It is not possible to determine what percentage of NIBRS weapons law violations consist of possession offenses versus use, sale, manufacture, purchase, transportation, or concealment offenses. Nor is it possible to determine what percentage of

NIBRS weapons law violations involve short-barreled shotguns versus handguns, cutting instruments, explosives, incendiary devices, brass knuckles, nunchucks, or other deadly weapons. Thus, observers should use common sense to adjust for mismatches between offenses enumerated in the ACCA and NIBRS offense definitions.

With these caveats, *Amici* nonetheless assert that NIBRS represents the best available data source for judging whether a felony poses a serious potential risk of injury to another within the meaning of the ACCA, for three reasons. First, NIBRS represents the largest and most comprehensive database on injuries associated with criminal offenses. *Id.* at 119. As of 2010, NIBRS contained records on 4,998,914 incidents across 32 states.[5] The 2010 NIBRS database covered law enforcement agencies that serve around 30% of the population of the United States. *Id.*

In the past, the Court has used significantly smaller databases to ascertain the approximate dangerousness of felony offenses under the ACCA. For example, in *Sykes*, the Court relied on a 2008 study published by the International Association of Chiefs of Police (IACP). 131 S. Ct. at 2274. That study reported the results of an online survey of around 23

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[5] The Lee et al., study used the 2010 NIBRS database to analyze which felonies pose a serious potential risk of injury under the ACCA. *Id.* The 2010 data was the most up-to-date data available at the time of the Lee et al., study.

police agencies conducted annually between 2001 and 2007. *Id.* Similarly, in *Chambers*, the Court turned to a study that examined a mere 160 incidents where a criminal failed to report to a penal institution. 555 U.S. at 129. By contrast, the 2010 NIBRS database contains records on nearly 5,000,000 criminal incidents. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 119. Even with its drawbacks, NIBRS represents a significant upgrade over these previously employed sources because the NIBRS database is much larger and more national in scope.

Second, because NIBRS groups together multiple offenses into incidents, it allows researchers to measure more accurately the risk associated with criminal offenses. Some offenses cannot, or usually do not, injure another person directly. But that does not mean that such offenses do not pose "serious *potential* risk of injury to another" 18 U.S.C. § 922(e)(2)(B)(ii) (emphasis added). When interpreting statutory text, "[i]f possible, every word and every provision is to be given effect (*verba cum effectu sunt acceptianda*). None should be ignored." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012). Congress's use of the word "potential" in conjunction with the word "risk" suggests that a felony need not be the direct or exclusive source of an injury in order to qualify under the residual clause. Any offense that, viewed categorically, facilitates or is otherwise meaningfully associated with highly injury-prone offenses "poses a serious potential risk of injury."

The quintessential illustration of this idea is burglary. The mere act of unlawfully entering into a structure is unlikely to be the direct source of an injury to another person. But burglary is associated with other offenses that do typically cause injury – most prominently, assault.[6] In a similar vein, possession of a weapon rarely, if ever, constitutes the direct source of an injury to another. Yet it is sufficiently associated with aggravated assaults – which frequently cause injury – to pose a serious potential risk of injury within the meaning of the ACCA. Lee et al., *supra*, at 120 n.27 (showing that 7.33% of incidents involving weapons law violations also involve an aggravated assault).

NIBRS allows *Amici* to measure both how often an offense directly results in an injury, and how often an offense co-occurs with other injurious offenses in a single criminal incident. By virtue of this recordkeeping structure, the NIBRS database is uniquely designed to measure both direct risk and *potential* risks posed by felony offenses.

Third, NIBRS allows the Court to compare the dangerousness of different felony offenses accurately because it uses a consistent methodology across

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[6] It should be noted that the Lee et al., study distinguishes generic burglary from non-generic burglary and recommends that the latter be excluded from the residual clause, precisely because non-generic burglary is insufficiently associated with other commonly injurious felonies. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 122-23.

reporting jurisdictions. In its residual clause jurisprudence to date, this Court has compared the dangerousness of crimes explicitly mentioned in the ACCA with crimes that might fall within the ambit of the residual clause. *See, e.g., Sykes*, 131 S. Ct. at 2274; *James*, 550 U.S. at 203. Such comparisons would ideally employ statistical data from a single source that uses a consistent methodology. Otherwise, small differences in methodology may skew any comparative measurements of dangerousness. In this dimension, NIBRS is ideal for comparative analysis.

II. According to NIBRS, weapons law violations are associated with a higher percentage of injuries than blackmail, arson, or burglary

In a study published in the *Federal Sentencing Reporter*, Professors Lee, Addington, and Rushin used NIBRS to measure which felonies pose a serious potential risk of injury. To do this, the authors compiled data on how frequently criminal incidents led to injuries to victims. Lee et al., *supra*, 26 Fed. Sentencing Rep. at 119. The study relied on the 2010 NIBRS extract file – one of the most recent years of publicly available NIBRS data. *Id.* In total, about 10.5% or 526,280 of the 4,998,914 criminal incidents listed in

the 2010 NIBRS extract file involved some injury to a victim.[7]

Predictably, the study found that incidents involving some criminal offenses more commonly co-occurred with injuries than others. *Id.* For example, criminal incidents involving offenses like aggravated assault, kidnapping, and robbery frequently involved injuries to victims.[8] On the other hand, incidents involving seemingly less violent offenses, such as wire fraud and credit card fraud, rarely involved injuries.[9]

The study found that extortion, arson, and burglary – three offenses that Congress specifically enumerated as violent felonies in the ACCA – were associated with a significant, but fairly modest, percentage of injuries relative to other crimes.[10] Incidents involving extortion co-occurred with injuries 4.41% of the time. *Id.* Arson incidents were associated with injuries 1.11% of the time. *Id.* And 1.02% of incidents involving burglary also involved

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[7] For the Lee et al., study, an incident is considered injurious if any victim suffered any injury at all, including fatalities. *Id.* at 119.

[8] Aggravated assault, kidnapping, and robbery resulted in injuries in 62.84%, 41.30%, and 31.71% of the incidents respectively. *Id.*

[9] Wire and credit card fraud incidents led to injuries 0.04 and 0.07% of the time respectively. *Id.*

[10] NIBRS has no specific offense category that maps neatly onto to the fourth enumerated offense category in the ACCA – use of explosives. *Id.*

injuries. *Id.* These numbers provide a statistical baseline for judging which offenses ought to be included within the residual clause of the ACCA. Using this Court's past decisions as a guide, if an offense poses a risk greater than or equal to one of the enumerated felonies in the ACCA, then inclusion of that offense in the residual clause may be appropriate.

In the present case, the Court must decide whether possession of a short-barreled shotgun falls under the residual clause. As already discussed, while NIBRS has no specific offense category for possession of that particular type of weapon, NIBRS does contain the broader category of weapons law violations. NIBRS defines this offense category as "[t]he violation of laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons." *Id.* at 125. This category includes possession of a short-barreled shotgun.

As noted by the study, 5.36% of incidents involving weapons law violations in 2010 led to some type of physical injury to a victim.[11] This is 21.5% more often

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[11] *Id.* at 119. It is also worth noting that the 2010 NIBRS data is roughly consistent with data from other years. Lee et al. used the 2010 NIBRS database for this previous study because it was the most recent data available at the time. In other years, weapons law violations were associated with injuries in the following percentage of incidents: 4.66% (2007), 4.26% (2008), 5.04% (2009), and 5.02% (2011). NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND

(Continued on following page)

than extortion, 382.9% more often than arson, and 425.5% more often than burglary. Put simply, as measured by NIBRS, weapons law violations are associated with injuries more often than three of the four felonies explicitly mentioned in the ACCA. Based on this observation, the study concluded that "[a]ll weapons law violations should be regarded as sufficiently risky to be included within the residual clause." *Id.* at 122.

Petitioner may criticize this conclusion for either of two reasons. First, Petitioner may argue that the study does not prove that weapons law violations actually *cause* physical injuries. Merely possessing a weapon can never, by itself, cause harm to another person. All the study can show is whether weapons law violations co-occur with other criminal offenses that cause physical injury to another. It is easy, moreover, to construct hypothetical cases where a weapons-law offense co-occurs with, but is causally unrelated to, an injury.

Imagine, for example, that two men get into a fistfight on a public street. During this fistfight, one of the men physically injures the other with his hands. Police report to the scene and arrest the two

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SOCIAL RESEARCH, NATIONAL INCIDENT-BASED REPORTING SYSTEM, 2007-2011: EXTRACT FILES (2007-2011), *available at* https://www.icpsr.umich.edu/icpsrweb/NACJD/series/128 (querying incident-level files for each year to determine how the percentage of incidents involving at least one "weapon law violation" that lead to any injury to a victim, measured by "type of injury" variables).

men. Upon arrest, officers find an unlawful firearm in the waistband of one of the combatants. The agency would record these events into NIBRS as a single criminal incident involving an assault, a weapons law violation, and an injury. Thus, NIBRS would show the injury and the weapons offense as co-occurring, even though the injury did not represent a coming-to-fruition of a risk associated with possession of an unlawful firearm. If this sort of case were common, Petitioner might have a valid argument that the NIBRS data do not effectively measure the real injury risk associated with weapons law violations.

Further evaluation of the NIBRS database, though, reveals that this sort of case is quite rare. Of the weapons law violation incidents that led to injuries, approximately 93% involved the use of a weapon against a victim.[12] This suggests that weapons law violations pose a serious potential risk of injury because a possessor may use the weapon to harm another person. The study also found that weapons

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[12] A total of 3,341 incidents involving a weapons law violation led to some injuries in a victim in the 2010 NIBRS extract file. In 3,106 of these incidents, the local agency reported that the incident involved the use of a weapon. NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, NATIONAL INCIDENT-BASED REPORTING SYSTEM, 2010: EXTRACT FILES (2010), *available at* https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/33601 (querying incident-level file to determine the percentage of incidents involving both a "weapon law violation" and an injury that also involved the use of any weapon, as measured by the "type of weapon" variable).

law violations most commonly co-occurred with such offenses as robbery and assault. *Id.* at 120 n.27. That finding is consistent with a conclusion that weapons law violations pose a serious potential risk of injury to another person *because they tend to facilitate the commission of other dangerous crimes*, like assault and robbery, where possession of a weapon may aid the criminal act.

Second, Petitioner may argue that the weapons law violations category used by NIBRS does not accurately map onto the offense at hand – possession of a short-barreled shotgun. No doubt, this category is an imperfect fit. It is broader than the specific offense at issue in this case.[13] But common sense offers no reason to think that possession of a short-barreled shotgun poses less potential risk of injury than the

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[13] NIBRS defines weapons law violations as "laws or ordinances prohibiting the manufacture, sale, purchase, transportation, possession, concealment, or use of firearms, cutting instruments, explosives, incendiary devices, or other deadly weapons." *Id.* at 125. Although there is no way to know the percentage of "weapons laws violations" that involved possession versus manufacture, sale, purchase, transportation, concealment or use, and although there is no way to know the percentage of violations that involved short-barreled shotguns versus (for example) handguns, switchblades, or Molotov cocktails, *Amici* can think of no reason that a subcategory of incidents involving possession of a short-barreled shotgun would co-occur with injuries significantly less often than the overall "weapons law violation" category figure of 5.36%.

average weapons law violation in the NIBRS database.

* * *

In sum, *Amici* believe that the empirical evidence presented in the Lee et al. study provides strong quantitative evidence for including weapons law violations generally, and possession of a short-barreled shotgun particularly, within the residual clause of the ACCA.

CONCLUSION

For the foregoing reasons, the Court should find that possession of a short-barreled shotgun meets the quantitative standards for inclusion within the residual clause of the ACCA.

Respectfully submitted,

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TABLE 1

Actual (fatal and non-fatal) Injuries Reported by Any Victim in Incident, 2010 NIBRS Data

Crimes	Percentage Injured
Murder/Nonnegligent Manslaughter	100%
Aggravated Assault	62.84%
Simple Assault	55.00%
Kidnaping/Abduction	41.30%
Robbery	31.71%
Forcible Rape	28.12%
Sexual Assault With An Object	24.40%
Forcible Sodomy	19.66%
Forcible Fondling	9.15%
Weapon Law Violations	5.36%
Extortion/Blackmail	4.41%
Bribery	3.71%
Destruction/Damage/Vandalism of Property	2.77%
Purse-snatching	1.71%
Pocket-picking	1.69%
Drug Equipment Violations	1.14%
Arson	1.11%
Drug/Narcotic Violations	1.06%

Intimidation	1.05%
Burglary/Breaking and Entering	1.02%
Stolen Property Offenses	0.74%
Statutory Rape	0.71%
Pornography/Obscene Material	0.67%
All Other Larceny	0.63%
Assisting or Promoting Prostitution	0.63%
Motor Vehicle Theft	0.49%
Theft From Building	0.49%
Shoplifting	0.39%
Gambling Equipment Violations	0.38%
Welfare Fraud	0.33%
Impersonation	0.28%
Operating/Promoting/ Assisting Gambling	0.27%
Prostitution	0.27%
False Pretenses/Swindle/ Confidence Game	0.23%
Betting/Wagering	0.17%
Theft From Coin-Operated Machine or Device	0.16%
Incest	0.14%
Counterfeiting/Forgery	0.13%
Embezzlement	0.09%
Theft From Motor Vehicle	0.09%

Credit Card/Automatic Teller Machine Fraud	0.07%
Theft of Motor Vehicle Parts/Accessories	0.06%
Wire Fraud	0.04%

AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

SAMUEL JAMES JOHNSON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, FAMILIES AGAINST MANDATORY MINIMUMS, AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Armed Career Criminal Act of 1984 substantially increases the penalty range for certain firearm possession offenses if the defendant has three qualifying prior convictions. A "violent felony" conviction qualifies. Under the Act, "the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year" that has certain specified elements or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

The Question Presented is whether the residual clause in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii) ("otherwise involves conduct that presents a serious potential risk of physical injury to another"), is unconstitutionally vague.

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Other Authorities

Carissa Byrne Hessick & Judith M. Stinson, *Juveniles, Sex Offenses, and the Scope of Substantive Law*, 46 Tex. Tech. L. Rev. 5 (2013) 19

Statement on Behalf of the Judicial Conference of the United States from U.S. District Judge Paul Cassell before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, 19 Fed. Sent. R. 344 (2007) 30

INTEREST OF *AMICI CURIAE*[1]

Amici curiae National Association of Criminal Defense Lawyers, National Association of Federal Defenders, and Families Against Mandatory Minimums are leading criminal defense associations that, among other things, provide training and legal resources to attorneys practicing in criminal law. The Cato Institute is a non-partisan public policy research foundation that since 1977 has advanced the principles of individual liberty, free markets, and limited government. *Amici* have a fundamental interest in the fair and just administration of the criminal justice system through clear laws that are properly applied in accordance with the dictates of the Constitution, the will of Congress, and the decisions of this Court.

More detailed information about individual *amici* is provided in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the fifth time since 2007, the Court seeks to resolve confusion in the lower courts over the scope and meaning of the Armed Career Criminal Act's ("ACCA's") residual clause. The Court has gone to great lengths to achieve this goal, applying the

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel contributed monetarily to its preparation or submission. All parties have consented to the filing of this brief and copies of the letters of consent have been lodged with the Clerk of the Court.

statute's Delphic language to specific state statutes that outlaw attempted burglary, failure to report for confinement, intentional flight from law enforcement, operation of a vehicle under the influence of alcohol, and now, possession of a short-barreled shotgun. But despite this Court's repeated attempts to clarify the residual clause, lower courts continue to struggle with a litany of challenges to the statute's application to myriad criminal laws—ranging from statutory rape to battery to inchoate offenses and beyond.

Numerous circuit splits persist, leaving the courts, litigants, and the public unable to surmise which predicate offenses are included within the residual clause or why. Each circuit split illustrates the confusion that flows from the statute's vague formulation. Given the sheer volume of these cases with their conflicting rationales, only one thing can be said about the residual clause with any certainty: It is "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). A decision that resolves whether the Minnesota firearm statute at issue otherwise involves conduct that presents a serious potential risk of physical injury to another is unlikely to succeed where four previous attempts have failed. Instead, lower courts will still be left without a guiding principle for deciding what the residual clause means for the hundreds of other state laws that may—or may not—be "violent felonies." Only by holding that ACCA's residual clause is unconstitutionally vague will the Court be able to put an end to this game of residual clause whack-a-mole.

ARGUMENT

I. DESPITE THIS COURT'S REPEATED EFFORTS TO DIVINE A WORKABLE STANDARD FROM THE VAGUE WORDING OF ACCA'S RESIDUAL CLAUSE, NUMEROUS CIRCUIT SPLITS PERSIST OR HAVE EVEN DEEPENED

In a quartet of cases since 2007, this Court has attempted to craft a coherent standard for determining whether a crime is a "violent felony" under ACCA's residual clause. *See Sykes v. United States*, 131 S. Ct. 2267 (2011); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007). Although each try has more or less resolved that question for the state statute then at issue, the process has not yielded a rule that provides lower courts or defendants with sufficient guidance for the multitude of other offenses that potentially qualify as violent felonies under the residual clause. As a result, similarly situated defendants face dramatically different outcomes depending on where—and even when—they are sentenced. A ruling that fails to confront the unconstitutional vagueness of the residual clause would leave these other circuit splits to be resolved by later grants of certiorari, on a state-statute-by-state-statute basis.

1. The Court has already seen this problem play out, first in *James* and continuing forward in *Begay*, *Chambers*, *Sykes*, and now *Johnson*. With the first four cases in the books, the law facing a lower court looks, as a general matter, something like this: If the predicate has a "close[] analog" to an enumerated offense, the court compares the risk presented by the

predicate with that presented by the analogous enumerated offense. *James*, 550 U.S. at 203. In doing so, the court tries to figure out what an "ordinary" violation of the predicate statute looks like and whether that violation "presents a serious potential risk of injury to another." *Id.* at 208. If the court decides that the risks are sufficiently similar, the predicate is a violent felony. But there is an important caveat: If the *Begay* test also applies to predicates with close analogous to an enumerated offense, the court must also examine whether the predicate involved "purposeful, violent, and aggressive" conduct. *See Sykes*, 131 S. Ct. at 2289 n.1 (Kagan, J., dissenting) ("I understand the majority to retain the 'purposeful, violent, and aggressive' test, but to conclude that it is 'redundant' in this case.").

For the large number of cases where the predicate is not analogous to an enumerated offense, a lower court must take a different approach. It starts by comparing the risk presented by the predicate (again, with an eye to the "ordinary" case) to the risk generally presented by (at least some of) the enumerated offenses. *See Sykes*, 131 S. Ct. at 2273-75; *but see Chambers*, 555 U.S. at 127-28 (using the *Begay* test to analyze risk level). If the risk level is not sufficiently comparable, the predicate is not a violent felony. If the risk level is sufficiently comparable, the court must choose from three more possible paths.

First, the court could embark on a *mens rea* analysis. *Begay*, 553 U.S. at 144-45. If the predicate's *mens rea* is less than knowingly, the court could conclude that the predicate is not a violent

felony. *See id.* If the *mens rea* is at least knowingly, the court could conclude that the predicate *is* a violent felony. *Sykes*, 131 S. Ct. at 2275-76. But it remains unclear whether a *mens rea* of knowingly or greater is sufficient by itself to qualify the predicate as a violent felony, *see id.* at 2289 n.1 (Kagan, J., dissenting) ("I do not think the majority could mean to limit the [purposeful, violent, and aggressive] test to 'strict liability, negligence, and recklessness crimes.'"), or, conversely, whether a *mens rea* of less than knowingly disqualifies a predicate from violent felony status. *Sykes*, 131 S. Ct. at 2275 ("levels of risk divide crimes that qualify from those that do not").

Second, the court could ask whether the predicate offense involves purposeful, violent, and aggressive conduct. *Begay*, 553 U.S. at 144-45; *Chambers*, 555 U.S. at 128. If the answer is yes, the court could conclude that it is a violent felony. *See Chambers*, 555 U.S. at 128. If the answer is no, the court could conclude that it is not. *See Begay*, 553 U.S. at 145-48. But aside from the problem of statutes that occupy a spot between those two extremes (*e.g.*, purposeful and violent, but not aggressive), it is unclear whether a *mens rea* of less than knowingly renders the purposeful, violent, and aggressive inquiry moot. *See, e.g.*, *Sykes*, 131 S. Ct. at 2276; *id.* at 2277 (Thomas, J., concurring in the judgment) ("[T]he majority errs by implying that the 'purposeful, violent, and aggressive' test may still apply to offenses 'akin to strict liability, negligence, and recklessness crimes.'").

Third, the court could try to avoid the uncertainty presented by the previous options by

limiting the residual clause to predicates that (i) are purposeful, violent, and aggressive, *and* (ii) require a *mens rea* of at least knowingly. But the jury is still out on whether that would be enough, in and of itself, because that inquiry does not ensure that the risk will be comparable to the risk posed by the enumerated offenses. *See Sykes*, 131 S. Ct. at 2275-76 ("In many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk . . . . As between the two inquiries, risk levels provide a categorical and manageable standard that suffices to resolve the case before us.").

2. Given this array of possible approaches, it should come as no surprise that lower courts have struggled mightily with nearly every other category of predicate that might be eligible for the status of violent felony. A review of just a handful of the circuit divisions that loom on the horizon helps illustrate why no end to this confusion is in sight.

Inchoate Offenses. State criminal codes—like Title 18 of the United States Code—contain numerous inchoate offenses such as attempt, conspiracy, or solicitation. At first blush, this Court's holding in *James* would seem to resolve the scope of the residual clause for attempt. In *James*, the focal point of the analysis was whether the risk posed by attempted burglary under Florida law was "comparable to that posed by its closest analog among the enumerated offenses," "completed burglary." 550 U.S. at 203. To convict under the Florida version of attempted burglary, the State must prove an overt act directed toward entry of a building; the Court reasoned that the offense was therefore a violent felony because both completed

and attempted burglary pose the same risk of "face-to-face confrontation between the burglar and a third party." *Id.* at 203-07.

Yet *James* brought no clear resolution for other types of attempt offenses, much less inchoate crimes in general. Some lower courts have held that these other inchoate state offenses are violent felonies, while other courts have held the opposite in indistinguishable circumstances. Indeed, as Justice Alito observed in *Chambers*, 555 U.S. at 133 n.2 (Alito, J., concurring), "even after" *James* a circuit split persists as to overt-act attempted burglary—the very type of crime that the Court considered in *James*. *Compare, e.g.*, *United States v. Martinez*, 602 F.3d 1166, 1171-73 (10th Cir. 2010) (concluding *Begay* left the relevant analysis in *James* intact, and therefore Arizona's attempted burglary statute is not a violent felony because it required a "step" toward commission of the offense, but not necessarily a "substantial" step), *with United States v. Davis*, 689 F.3d 349, 357-58 (4th Cir. 2012) (after *Begay*, the test under *James* is whether the conduct at issue is "purposeful, violent, and aggressive," and "in the ordinary case, presents a serious potential risk of injury to another"; holding that West Virginia's attempt statute is a violent felony (internal quotation marks omitted)), *United States v. Smith*, 645 F.3d 998, 1004-05 (8th Cir. 2011) (noting *Sykes* requires examination into "levels of risk" and holding that the overt act required under Minnesota's attempted burglary law presented a level of risk similar to completed burglary), *and United States v. Lynch*, 518 F.3d 164, 170 (2d Cir. 2008) (under comparison test of *James*, New York's attempted

burglary offense is a violent felony because it requires an overt act that "carr[ies] the project to within dangerous proximity of its accomplishment" (internal quotation marks omitted)).

Confusion also continues for other inchoate offenses such as conspiracy to commit a violent crime. The approach favored by the Fifth and Ninth Circuits applies *James* to inquire whether the "target offense" of the conspiracy—for example, robbery—presents a risk "comparable to that posed by its closest analog among the enumerated offenses." That tends to bring crimes of conspiracy within the residual clause regardless of whether any overt act is required—a result at odds with the attempted burglary case law discussed above.

For example, in *United States v. Chandler*, the Ninth Circuit held that the Nevada offense of non-overt-act conspiracy to commit robbery is a violent felony. 743 F.3d 648, 653-55 (9th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3149 (U.S. Sept. 8, 2014) (No. 14-282). The court relied on *James* to reason that a conspiracy "increases the chances that the planned crime will be committed," and thus "creates the same risk of harm as the violent crime itself." *Id.* at 652, 654 (citing *United States v. Mendez*, 992 F.2d 1488 (9th Cir. 1993)). Utilizing the *James* comparison test, the court concluded that robbery poses potentially greater risk of serious injury than burglary or extortion "because robbery requires a taking from a person, against his or her will, by means of force or violence or fear of injury." *Id.* at 655. A target-offense analysis therefore led the court to declare conspiracy to commit robbery a violent felony under the residual clause.

Similarly, the Fifth Circuit concluded in *United States v. Gore*, 636 F.3d 728, 734, 738 (5th Cir. 2011), that the Texas offense of conspiracy to commit aggravated robbery is a violent felony. The Fifth Circuit applied *James* to conclude that the offense "presents a serious potential risk of injury," because the agreement increased the "possibility of a face-to-face confrontation" should "the agreement . . . be carried forward." *Id.* at 736-38. Further, *Gore* determined that its conclusion was compatible with this Court's decisions in *Begay* and *Chambers*, because a robbery conspiracy contemplates physical assault and aggression toward another person and is therefore "similar in kind as well as degree of risk posed" by the enumerated offenses. *Id.* at 739 (internal quotation marks omitted).

Other courts such as the Tenth Circuit take a different approach; while they also are guided principally by *James*, they limit the residual clause's "risk" inquiry to the conspiracy offense itself as opposed to the target of the conspiracy. These courts are therefore more likely to conclude that the same state offenses are *not* violent felonies within the meaning of the residual clause. In *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007), for example, the court considered a Colorado conviction for conspiracy to commit burglary. Even though the statute required proof of an overt act, that act did not "need [to] be directed toward the entry of a building or structure," leading the court to conclude that it might "create no risk of a violent confrontation." *Id.* at 1044. Noting that the overt act could be "wholly lawful if committed apart from the conspiracy," the court found the risk of physical injury of conspiracy

to commit burglary was not comparable to that presented by the completed crime. *Id.* at 1041-42, 1044; *see also Martinez*, 602 F.3d at 1168-73 (applying *Fell* to Arizona's attempted burglary statute).

The Eleventh Circuit has taken yet another approach to conspiracy claims, ruling that the *James* test must be applied differently after *Begay*. This approach tends to rule out conspiracies as violent felonies. In *United States v. Whitson*, 597 F.3d 1218, 1222 (11th Cir. 2010) (per curiam), for example, the Eleventh Circuit addressed the South Carolina crime of non-overt-act conspiracy to commit robbery.[2] Although the court reaffirmed its prior holding that a conspiracy to commit a violent crime "concerns serious risk of physical injury," it read *Begay* to require not only the risk of injury specified in *James*, but also that the offense of conviction "in itself, involves conduct that is purposeful, violent, and aggressive." *Id.* *Begay*, the Eleventh Circuit held, "requires us to separate" the conspiracy and its target offense "and to examine *the conspiracy alone*."

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[2] The Eleventh Circuit was applying U.S.S.G. § 4B1.2, the Sentencing Guidelines provision for Career Offenders, which has the same language used in ACCA's residual clause. *Compare* U.S.S.G. § 4B1.2(a)(2), *with* 18 U.S.C. § 924(e)(2)(B)(ii). Lower courts apply this Court's rulings on ACCA's residual clause to determinations made under the residual clause of § 4B1.2. *See, e.g., United States v. Polk*, 577 F.3d 515, 518-19 (3d Cir. 2009); *United States v. Mohr*, 554 F.3d 604, 608-09 (5th Cir. 2009); *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008).

Id. at 1223. Because South Carolina conspiracy law did not require proof of an overt act, the court declared it was "difficult" to "see how the simple act of agreeing is either 'violent' or 'aggressive.'" *Id.* at 1222; *see also United States v. Lee*, 631 F.3d 1343, 1349 (11th Cir. 2011) (affirming *Whitson*'s analysis).

The Fourth Circuit agrees with the Eleventh Circuit's mode of analysis, but it reaches the opposite result. In *United States v. White*, 571 F.3d 365, 372-73 (4th Cir. 2009), the court held that non-overt-act conspiracy to commit robbery under North Carolina law is a violent felony because the agreement is "to achieve a violent objective" and the "inten[t] to achieve that object . . . substantially increase[s] the risk that [the conspirators'] actions will result in serious physical harm to others." *Id.* at 371. Further, the court reasoned that the offense was "purposeful, violent, and aggressive" because the intentional agreement made the contemplated "acts of violence . . . much more likely." *Id.* at 371-72.

These cases show that a ruling on whether possession of a sawed-off shotgun in Minnesota is a violent felony under the residual clause would leave unresolved the multiple splits for the different variations of attempt, conspiracy, and other inchoate offenses found in the criminal codes of each State.

Battery on a Law Enforcement Officer. Courts have similarly been unable to glean from this Court's decisions a consistent approach to whether the crime of battery on a law enforcement officer is a violent felony under the residual clause. As a result, different courts reach different outcomes for state statutes that are essentially the same.

Some circuits have relied on *Begay* and *James* to label this type of battery a violent felony if the risk of injury presented by the "ordinary" commission of the offense is comparable to that for an enumerated offense. In these circuits, it does not matter whether the state statute also encompasses a variety of conduct that unquestionably fails to present the risk. For example, the Tenth Circuit in *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009), relied on *Begay* and *James* to rule that Oklahoma's statute is a crime of violence under U.S.S.G. § 4B1.1. *Id.* at 1147-49 (construing test under *James* and *Begay* as whether "the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another" (internal quotation marks omitted)). The court looked to the facts of several state cases to conclude that "[t]he ordinary violation of the statute in this case involves far more violence than slight touching," even though "only the *slightest touching* is necessary" for conviction of the crime. *Id.* at 1146 n.4, 1148. The court further determined that while the offense of battery on a police officer "may or may not explode into violence and result in physical injury to someone at any given time," it "*always* has the serious potential to do so." *Id.* at 1149; *see United States v. Kutz*, 439 F. App'x 751, 753 (10th Cir. 2011) (reaffirming and applying *Williams* in construing ACCA's residual clause); *see also United States v. Smith*, 652 F.3d 1244, 1248 (10th Cir. 2011) (stating *Sykes* clarified the inquiry for intentional crimes under *Begay* and *James* is whether a crime is "similar in risk to the listed crimes," not whether it is "purposeful, violent, and aggressive," and applying *Williams* to an Oklahoma conviction for assault or

battery by a person in custody of an employee of the Office of Juvenile Affairs).

The First Circuit reached the same result for a Massachusetts statute that punishes assault and battery on a law enforcement officer. But that was only fortuitous, because the First Circuit does not apply the Tenth Circuit's test. Instead of looking primarily at the "ordinary case," the First Circuit emphasizes *Begay*'s "purposeful, violent, and aggressive" formulation. *United States v. Dancy*, 640 F.3d 455, 465-68 (1st Cir. 2011). The court reasoned that the offense requires the defendant to know his victim was a police officer on active duty, which it found was enough to meet *Begay*'s "purposeful" requirement. *Id.* at 467-69. Only within this construct did the court apply a hybrid of the "ordinary case" approach, reasoning that "the crime . . . nearly always involves the intentional striking of a police officer," who "usually" is armed. *Id.* at 468, 470. Together, these suppositions demonstrated that the offense involves "purposeful, violent, and aggressive conduct" and fell within the residual clause. *Id.* at 466, 470; *see also, e.g.*, *United States v. Anderson*, 745 F.3d 593 (1st Cir. 2014), *petition for cert. filed*, No. 14-5229 (U.S. July 12, 2014) (applying *Dancy*'s reasoning to Massachusetts offense of battery against court officer); *United States v. Jonas*, 689 F.3d 83 (1st Cir. 2012) (same as to Massachusetts offense of battery against a correctional officer). It is quite possible that without the knowledge requirement found in the Massachusetts statute, the First Circuit and the Tenth Circuit would come to different conclusions; the Tenth Circuit's conclusion about the riskiness of

an "ordinary violation" does not appear to turn on a *mens rea* analysis.

The Fourth Circuit also disagrees with the Tenth Circuit's test—but, unlike the First Circuit, the Fourth Circuit concludes that battery on a law enforcement officer is *not* a crime of violence under U.S.S.G. § 4B1.1. The Fourth Circuit's reasoning shifts the focus away from both the "purposeful, violent, and aggressive" test and the "ordinary case," instead emphasizing the categorical approach utilized in *Sykes* and *James*. *United States v. Carthorne*, 726 F.3d 503, 507 (4th Cir. 2013) (Virginia statute), *cert. denied*, 134 S. Ct. 1326 (2014). Under this categorical approach, the court found dispositive the fact that a conviction could rest on even "the slightest touching or without causing physical injury to another." *Id.* at 514. The statute's elements thus did not pose "a *serious* potential risk of physical injury." *Id.* As for its sister circuit's empirical observation that such conduct presents the ever-present "serious potential" to "explode into violence," the Fourth Circuit was not convinced. *Id.* (warning that courts "would do a great disservice to law enforcement officers by accepting . . . that a police officer who is a victim of [assault or battery] . . . is like a powder keg, capable of exploding into violence").

Making matters more muddled, the Fourth Circuit insisted that even if it agreed with the First Circuit on the appropriate test, it would still disagree on the outcome. According to the Fourth Circuit in *Carthorne*, "the elements of the offense do not substantiate the proscribed conduct as 'violent,' even

if it could be considered 'purposeful' and 'aggressive.'" 726 F.3d at 515 n.12.

Completing the circle, the Eleventh Circuit agrees with the Fourth Circuit that *Sykes* controls, but when the Eleventh Circuit applies that reading of *Sykes* it instead reaches the outcome of the courts that *reject* such an approach. *See Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1341 (11th Cir. 2013), *cert. denied*, 133 S. Ct. 2873 (2013) (concluding that if vehicular flight in *Sykes* "fell under the residual clause because it could *potentially* cause a confrontation with police," then battery must also, as it "*necessarily* includes some physical confrontation with police").

Statutory Rape. Even greater lower-court confusion will confront this Court when the time comes to consider prior convictions for statutory rape. These state laws vary significantly from one State to the next along numerous inflection points, including the age of the victim, the age of the defendant, the specific conduct prohibited, and whether force is an element. In evaluating whether the offense "otherwise involves conduct that presents a serious potential risk of physical injury to another," courts must first choose which test to apply and then evaluate one or more of the relevant statutory elements, often proceeding on intuition and feel in the absence of empirical data. As the First Circuit has observed, this task is one lower courts have "neither the expertise nor the authority" to perform, *United States v. Meader*, 118 F.3d 876, 885 (1st Cir. 1997), and it has led to inconsistent outcomes.

Those circuits holding that statutory rape is a violent felony do not agree why. In *United States v. Daye*, 571 F.3d 225, 231-34 (2d Cir. 2009), for example, the Second Circuit applied *Begay* to conclude that Vermont's law prohibiting sexual assault of a child encompasses "purposeful, violent, and aggressive" conduct, even though the law is a strict liability crime that reaches not just "forcible assault" but also sexual contact without physical force. The court reasoned that, despite strict liability, the sexual contact is intentional, and "creates a risk of injury to the victim," because "a child has essentially no ability to deter an adult from using such force to coerce the child into a sexual act." *Id.* at 234. The Second Circuit also stated that even if the child had "purportedly consen[ted]," there was still "a serious risk of physical injury" due to, *inter alia*, the greater odds of contracting sexually transmitted diseases. *Id.* at 231. Relying on a combination of intuition and precedent, the court concluded that "a typical instance of this crime will involve conduct that is at least as intentionally aggressive and violent as a typical instance of burglary." *Id.* at 234.

The First Circuit has also labeled statutory rape a violent felony in some contexts, but rather than rely on *Begay* it emphasized *James* and its "similarity of risk" analysis. *See United States v. Velazquez*, 2015 WL 310487 (1st Cir. Jan. 26, 2015) (holding Maine offense of statutory rape of minors under fourteen years of age is a violent felony). Unlike the Second Circuit, the *Velazquez* court acknowledged that *Begay*'s "purposeful, violent, and aggressive" test could be read to exclude strict

liability crimes from the residual clause, but it went on to explain that the *Begay* formulation merely "serve[d] as a general guide in discerning whether an offense is sufficiently 'similar in kind' to the exemplar crimes." *Id.* at *5-6. What mattered, according to the First Circuit, was the presence of "conduct that is not only dangerous but also indicative of a willingness to inflict harm on an identifiable victim." *Id.* at *5; *see also United States v. Howard*, 754 F.3d 608, 609-10 (8th Cir. 2014), *petition for cert. filed*, No. 14-7280 (U.S. Nov. 24, 2014) (analyzing Arkansas's statutory rape statute under a "similarity of risk" test and holding it was a violent felony, but without identifying which Supreme Court case applies); *United States v. Thomas*, 231 F. App'x 765, 766 (9th Cir. 2007) (applying *James* and holding that statutory rape under Washington law poses categorical risk of harm because "it necessarily involves close physical contact with a victim who has clearly expressed lack of consent to sexual intercourse," even though statute "does not require an element of force").

Unlike the Second Circuit, which disagrees with the First Circuit on the test but agrees on the result, the Fourth, Seventh, Tenth, and Eleventh Circuits agree with the First Circuit on the test but then disagree on the result. For instance, in *United States v. McDonald*, 592 F.3d 808, 815 (7th Cir. 2010), the Seventh Circuit applied the *Begay* approach to hold that a Wisconsin statute prohibiting "*all* acts of sexual intercourse or contact with a child age 13 to 15" was not categorically a violent felony. That definition of the offense, the court reasoned, "sweeps broadly . . . without regard to consent-in-fact or

whether the perpetrator and the victim are close in age." *Id.* Given the breadth of the statute, there was no basis under *Begay* to find the offense "typically 'violent and aggressive'" based solely on the ages of the victims, as other circuits had done. *Id.* (internal quotation marks omitted); *see also United States v. Thornton*, 554 F.3d 443, 447-49 (4th Cir. 2009) (holding similarly and stating medical evidence of harms—including unplanned pregnancy and sexually transmitted diseases—that may result from sexual contact between adults and minors is insufficient to establish that Virginia's offense of statutory rape is a violent felony under the residual clause because *Begay* requires the offense to be "like those listed in [the residual clause], both in kind and degree of risk"); *United States v. Owens*, 672 F.3d 966, 971-72 (11th Cir. 2012) (similar; under *Begay*, second-degree rape and sodomy of minors between twelve and sixteen under Alabama law does not pose the same kind or degree of risk as the enumerated offenses).

The Tenth Circuit adds a different gloss, viewing *Begay* as creating an "exception" to the residual clause for all strict liability, negligence, and recklessness crimes, such that a strict-liability statutory rape offense can never be a violent felony. *United States v. Wray*, 2015 WL 328589, at *7-8 (10th Cir. Jan. 27, 2015). Because Colorado's statute prohibiting sexual assault of minors between fifteen and seventeen years where the perpetrator was at least ten years older was a strict liability crime, *Begay* meant it was per se not a crime of violence under U.S.S.G. § 4B1.2. *Id.* at *7. This is, of course, the opposite of what the Second Circuit concluded

after applying the same language from *Begay*. *See Daye*, 571 F.3d at 234-35.

The statutory rape laws demonstrate why it is so difficult to apply the various court-generated residual clause tests with consistency. Putting aside variations from one State to the next, the *same* statute can penalize conduct whether the offender and victim differ in age by three years or thirty; whether the victim gave "consent-in-fact" or strongly resisted; or whether the offender was in a position of authority or a schoolmate. The makes determination of the "ordinary case" of statutory rape especially problematic; some conduct prosecuted under these laws is extremely "purposeful, violent, and aggressive," while other conduct is not fairly described as meeting this test. *See, e.g.*, Carissa Byrne Hessick & Judith M. Stinson, *Juveniles, Sex Offenses, and the Scope of Substantive Law*, 46 Tex. Tech. L. Rev. 5, 12-18 (2013) (discussing how age-determinative sex offenses may be less serious based on the perpetrator's age). Thus, even after this Court takes up its first residual clause statutory rape case, it is unlikely that the decision will provide meaningful guidance for lower courts as they face a multitude of other statutory rape laws with their many varying elements.

3. These are just three types of state laws where disagreements in outcome and approach have persisted and even worsened despite this Court's repeated attempts to give meaning to the residual clause. The lower court opinions are a testament to the futility of seeking to manufacture clarity on a case-by-case basis, rather than through legislation. There is no reason to think that, on its fifth try, this

Court could craft an intelligible principle that would clarify the residual clause's applicability to other potential predicates, particularly given the fractured decisions that the first four cases have generated. After several years of effort, neither the Government nor anyone else has come up with a workable test, much less one faithful to the words Congress used in drafting the statute. Instead, the residual clause continues to create more questions for every one that this Court tries to answer.

II. THE RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE AS TO ALL POSSIBLE PREDICATES

As the judiciary's experience with ACCA demonstrates, the residual clause "provides no 'ascertainable standard' for the conduct it condemns." *Skilling v. United States*, 561 U.S. 358, 424 (2010) (Scalia, J., concurring in part and concurring in the judgment). This Court should therefore reverse Mr. Johnson's conviction in a decision that recognizes the residual clause's unconstitutional vagueness in all of its potential applications. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (permitting a facial vagueness challenge where statute was alleged to be vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all").

1. This Court normally limits its inquiry to whether a statute is vague as applied to the facts of the case before it. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010); *Chapman v. United States*, 500 U.S. 453, 467 (1991); *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *Village of*

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982); *United States v. Powell*, 423 U.S. 87, 92 (1975); *Parker v. Levy*, 417 U.S. 733, 757 (1974). For several reasons, this Court should conclude that the unconstitutional vagueness of the residual clause is not confined to sawed-off-shotgun-possession offenses.

Despite the general preference for assessing vagueness on an as-applied basis, this Court has decided due-process vagueness challenges that are not limited to the facts of a given case. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 55-64 (1999); *Kolender v. Lawson*, 461 U.S. 352, 357-62 (1983); *Smith v. Goguen*, 415 U.S. 566, 572-78 (1974); *Coates*, 402 U.S. at 614; *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-91 (1921). The key difference in those cases is that the provision at issue "simply has no core," thus lacking "any ascertainable standard for inclusion and exclusion." *Gougen*, 415 U.S. at 578. Where a statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all," *Coates*, 402 U.S. at 614, it is unconstitutional in *all* potential applications.

Vagueness challenges of this sort are essential to preserving the separate roles of the legislature and the judiciary. In constitutional democracies, vague laws—and vague criminal laws in particular—fundamentally undermine the relationship between the government and its citizens. Citizens vest in their elected representatives the highly potent power to draft laws that deprive persons of their property,

their liberty, and even their life. The legislature violates its compact with the people when it tries to delegate to the courts the weighty task of deciding what conduct triggers those severe penalties. However well-meaning or technically skilled federal judges might be in drawing those lines, the people have assigned that duty to their elected representatives, who are more directly responsive to the voice of the people.

This Court therefore has explained that "there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning." *United States v. Evans*, 333 U.S. 483, 486 (1948). When Congress writes a law so indefinite that the courts are left to create both its core and its outer boundaries on a case-by-case basis, the prohibition on federal common law crimes goes out the window. *See id.* ("In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions."); *see also United States v. Lanier*, 520 U.S. 266, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts.").

The residual clause is unconstitutionally vague for reasons that are by no means peculiar to Mr. Johnson's case or to the particular statute here. For any potential predicate, the problem is that the residual clause is "so vague and standardless" that it not only "leaves the public uncertain as to the conduct it prohibits," *Giaccio*, 382 U.S. at 402-03, but also delegates impermissibly the legislative power to "defin[e] crimes and fix[] penalties." *Evans*, 333 U.S.

at 486. Indeed, as different Justices have recognized, the case law applying the residual clause has necessarily developed on an essentially arbitrary and ad hoc basis. *See, e.g.*, *James*, 550 U.S. at 215 (Scalia, J., dissenting) ("The problem with the Court's approach to determining which crimes fit within the residual provision is that it is almost entirely ad hoc."); *Chambers*, 555 U.S. at 133 (Alito, J., concurring in the judgment) ("ACCA's residual clause is nearly impossible to apply consistently."); *Sykes*, 131 S. Ct. at 2295 (Kagan, J., dissenting) ("So by its own terms, the Court's opinion—our fourth applying ACCA's residual clause in as many years—applies only to a single State's vehicular flight statute as it existed from 1998 to 2006." (quoting *id.* at 2287 (Scalia, J., dissenting) ("[W]e will be doing ad hoc application of ACCA . . . until the cows come home.")).

2. As this Court has struggled to avoid crossing the line between interpreting and making law, defendants have been unable to surmise how the residual clause will apply to the multitude of predicates yet to make it onto this Court's docket. This is not a statute that plainly applies to some conduct but has uncertainty at the outer margins. For statutes like that, a defendant "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Humanitarian Law Project*, 561 U.S. at 20. The residual clause is different, because no predicate is clearly a violent felony under ACCA's residual clause until after this Court says so.

This absence of a core of covered conduct is a product of how the residual clause operates. In the

typical penal statute that uses risk of injury as an element, the defendant will be in a position to ask whether his conduct is sufficiently "risky." *See, e.g.*, *James*, 550 U.S. at 210 n.6 (citing statutes that forbid such things as "creat[ing] a substantial risk of serious bodily injury to any other person" by destroying or damaging property); *Sykes*, 131 S. Ct. at 2277 (same). The residual clause is different. Its role is to categorize previous convictions for recidivism-enhancement purposes. The clause seeks to bring within its scope a wide array of statutes covering highly varied types of offenses. Thus, an ACCA defendant must surmise whether a *statute* of conviction is of the *type* that will meet the relevant test (or tests) articulated by this Court. At least with other "risk of injury" laws the defendant can compare *his own* contemplated conduct to the language of the statute. The residual clause, though, necessarily looks to many things that are quite separate from the defendant's conduct. These include the "typical" case prosecuted under the same or similar statutes, statistical analyses of prosecutions as a whole, or offense elements across a range of other statutes (including those in other States) that the defendant did not violate.

Mr. Johnson's case illustrates this important distinction. He did not receive a higher sentence because he previously possessed a sawed-off shotgun in a manner that created an unacceptable risk of injury to others. He received it because the lower courts concluded that this statutory offense was similar in kind and risk to the enumerated offenses. *United States v. Johnson*, 526 F. App'x 708, 711 (8th Cir. 2013). For Mr. Johnson to have understood that

his prior offense qualified as an ACCA predicate, he would have needed to predict which of the tests applied—should he focus on the "ordinary case"? whether possession rises to the level of "purposeful"? some other formulation? And even assuming he knew the right test, he still would have needed to develop a working knowledge of how Minnesota's possession statute and statutes arguably like it apply across the totality of persons who might violate them. It is hard to imagine a statute where the penal consequences of a defendant's conduct are so far removed from, well, the defendant's own conduct.

3. This is not a situation where "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute." *Lanier*, 520 U.S. at 266. Over an eight-year span this Court has decided whether four particular state statutes are violent felonies under the residual clause. But as explained earlier, those decisions have offered no clear guidance for the multitude of other predicates that can be found, in all their varied formulations, in the criminal codes of every State. *See*, *e.g.*, *Begay*, 553 U.S. at 148 ("we hold only that, *for purposes of the particular statutory provision before us*, a prior record of DUI . . . . falls outside the scope of [ACCA]" (emphasis added)).

The sheer number of times this Court has revisited the residual clause in less than a decade is telling: In no other context have repeated decisions by this Court so "utterly fail[ed] to do what this Court is supposed to do: provide guidance concrete enough to ensure that the ACCA residual provision will be applied with an acceptable degree of consistency by the hundreds of district judges who

impose sentences every day." *James*, 550 U.S. at 215 (Scalia, J., dissenting).

4. A ruling from the Court on whether another particular state statute "otherwise involves conduct that presents a serious potential risk of physical injury to another," will provide little relief—to this Court, to the lower courts, or to defendants. And even were it possible to recast that statutory language to create a predictable core of covered predicates, it "is not the job of this Court to impose a clarity which the text itself does not honestly contain." *Sykes*, 131 S. Ct. at 2287 (Scalia, J., dissenting); *see also United States v. Reese*, 92 U.S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."). Accordingly, this Court should declare ACCA's residual provision unconstitutionally vague.

III. ACCA'S IMPOSITION OF A SUBSTANTIAL, MANDATORY MINIMUM SENTENCE WARRANTS HEIGHTENED SCRUTINY

The confusion engendered by ACCA's residual clause is of heightened concern given the significantly higher minimum penalty that the residual clause mandates. A conviction of unlawful possession of a firearm as a previously convicted felon—the principal offense that potentially subjects a defendant to ACCA—is punishable by a statutory maximum of ten years' imprisonment, with no mandatory minimum. 18 U.S.C. § 924(a)(2). Under the Sentencing Guidelines, a defendant with two qualifying felony convictions who pleads guilty to

possessing a single firearm and earns credit for acceptance of responsibility will typically face a sentencing range of fifty-seven to seventy-one months. U.S.S.G. §§ 2K2.1(a)(1), 3E1.1, 5A (sentencing table, level 23, Criminal History Category III). If, however, a defendant "has three previous convictions . . . for a violent felony or a serious drug offense," ACCA subjects that defendant to a mandatory *minimum* of fifteen years' imprisonment, and a maximum of life. 18 U.S.C. § 924(e)(1); *Logan v. United States*, 552 U.S. 23, 27 (2007).

Application of the residual clause thus has enormously severe consequences, roughly tripling the sentence otherwise recommended for the offense. This dramatic and mandatory increase warrants heightened judicial scrutiny. Mandatory minimums, as this Court has repeatedly recognized, subject defendants to a greater loss of liberty, constrict or eliminate altogether a sentencing judge's discretion, are fundamentally at odds with imposing fair, honest, and rational sentences, and create disproportionate impacts on many offenders. Those consequences are all the more severe where a mandatory minimum raises the sentence far above the statutory maximum that would otherwise apply. This Court should require Congress to speak more clearly than otherwise would be the case before concluding that Congress has made clear its intent to subject particular individuals to such consequences. Because Congress did not do so in ACCA's residual clause, that clause should be invalidated.

1. Statutes imposing mandatory minimums are "phenomena of fairly recent vintage genesis." *Harris*

v. United States, 536 U.S. 545, 581 n.5 (2002) (Thomas, J., dissenting); *cf. United States v. Booker*, 543 U.S. 220, 236 (2005). Over the course of the past two decades, this Court has repeatedly recognized the impact of, and the necessity of heightened scrutiny to evaluate, statutes that impose such mandatory minimums.

There are several good reasons to tread cautiously in this area. First, by increasing the penalty for a crime, mandatory minimums have a substantial impact on a defendant's constitutionally protected liberty interest. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). As this Court recently explained, "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's 'expected punishment has increased as a result of the narrowed range' and the 'prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish.'" *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 522 (2000) (Thomas, J., concurring)); *see also Harris*, 536 U.S. at 577-78 (Thomas, J., dissenting) ("As a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense."). The Sixth Amendment therefore requires that a jury find any fact necessary to impose a mandatory minimum sentence. *Alleyne*, 133 S. Ct. at 2158.

Second, mandatory minimums "can eliminate a sentencing judge's discretion in its entirety." *Almendarez-Torres v. United States*, 523 U.S. 224, 244-45 (1998). In *Almendarez-Torres*, the Court foresaw exactly the predicament courts find themselves in under the residual clause: "A mandatory minimum can . . . mandate a *minimum* sentence of imprisonment more than twice as severe as the *maximum* the trial judge would otherwise have imposed." *Id.* (quotation marks omitted). That is what happened at Mr. Johnson's sentencing hearing. Transcript of Sentencing Hearing, R. Doc. 39, at 22 ("I impose the sentence reluctantly because a sentence of half that or two-thirds of that would be more than sufficient to qualify. But as I say, I do not have any choice in the matter.").

Third, statutes imposing mandatory minimum sentences "can produce unfairly disproportionate impacts on certain kinds of offenders." *Almendarez-Torres*, 523 U.S. at 245. Unlike the Guidelines, mandatory minimums "rarely reflect an effort to achieve sentencing proportionality—a key element of sentencing fairness that demands that the law punish a drug 'kingpin' and a 'mule' differently." *Harris*, 536 U.S. at 570-71 (Breyer, J., concurring in part and concurring in the judgment). Similarly, these statutes often "transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring," a transfer of power that has "reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate." *Id.* at 571; *see also id.* at 570 ("[A]s mandatory minimum sentencing statutes have proliferated in number and importance, judges,

legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter of concern to judges and to legislators alike."); *Statement on Behalf of the Judicial Conference of the United States from U.S. District Judge Paul Cassell before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security*, 19 Fed. Sent. R. 344, 344 (2007) ("Mandatory minimum sentences mean one-size-fits-all injustice. . . . [and] produce sentences that can only be described as bizarre.").

For each of these reasons, statutes that routinely impose a harsh and frequently disproportionate mandatory minimum sentence warrant greater scrutiny.

2. Applying heightened scrutiny to the residual clause is consistent with this Court's long-standing approach to mandatory minimum statutes. Before *Alleyne*, this Court recognized that treating the triggering fact for a mandatory minimum as a mere sentencing factor for the judge to find by a preponderance of the evidence "would raise serious constitutional questions[.]" *Jones v. United States*, 526 U.S. 227, 251-52 (1999); *id.* at 243-44 ("It is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations *setting ultimate sentencing limits* without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." (emphasis added)). Accordingly, the Court required that fact to be submitted to the jury. *Id.* at 251-52.

The possibility that a mandatory minimum provision will produce significant disparities in sentence outcomes has likewise guided this Court's decisions on the scope and nature of essential procedural protections. *See Castillo v. United States*, 530 U.S. 120, 127, 131 (2000) (holding "the length and severity of [the] added mandatory sentence" required a jury finding). When this Court held that the jury must find a fact that "vaults a defendant's mandatory minimum sentence from 5 to 30 years," it found it "not likely that Congress intended to remove the indictment and jury trial protections when it provided for such an extreme sentencing increase." *United States v. O'Brien*, 560 U.S. 218, 229-31 (2010).

Alleyne was the capstone of these cases, holding that *any* fact increasing the mandatory minimum sentence must be submitted to the jury. 133 S. Ct. at 2161. This conclusion was compelled because "it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment." *Id.* Simply stated, "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id. Alleyne* holds that *all* mandatory minimums warrant this constitutional protection. And consistent with this Court's pre-*Alleyne* pronouncements, a particularly severe, mandatory consequence—like that imposed by ACCA—warrants particularly careful consideration.

Beyond the Sixth Amendment context, this Court has similarly displayed heightened sensitivity toward the use of mandatory minimums to impose disproportionally severe consequences. When this Court held unconstitutional a statute that made

death the mandatory sentence for first-degree murder, it echoed the concern applicable to all mandatory minimums, noting that they simply do not allow for "consideration of more than the particular acts by which the crime was committed." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality). In applying that same logic beyond the death penalty context, this Court recently held "that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (emphasis added). The Court placed special emphasis on the fact that "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467.

The Court exercises special caution when addressing mandatory sentences because due process principles apply most acutely in the criminal context. "The ordinary mechanism that we use . . . for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' is the test that we articulated in *Mathews v. Eldridge*." *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2007) (internal citation omitted); *see also Carey v. Piphus*, 435 U.S. 247, 259-60 (1978). Under *Mathews v. Eldridge*, 424 U.S. 319 (1976), the specific "private interest that will be affected by the official action" is of critical importance in identifying the "specific dictates of due process." *Id.* at 334-35. Due process protections are thus most important in the criminal context because the private interest at stake is the "most elemental of

liberty interests—the interest in being free from physical detention by one's own government." *Hamdi*, 542 U.S. at 529; *see also Addington v. Texas*, 441 U.S. 418, 423-24, 428 (1979) ("The heavy [due process] standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free"; discussing burden of proof).

A statute like ACCA implicates these liberty interests in a more heightened manner by taking away the district court's option to consider mitigating factors and replacing that exercise of discretion with a dramatic, mandated increase in the prison term. Due process demands a more exacting scrutiny to ensure the statute gives fair notice of that draconian consequence.

3. The heightened scrutiny required here is also consistent with the caution that this Court has exercised in construing ACCA's residual clause. In *Begay*, for example, the Court relied on the severity of the penalty to reject the residual clause's applicability to DUI, even though the Court "assume[d] that the lower courts were right in concluding that DUI involves conduct that 'presents a serious potential risk of physical injury to another'" and acknowledged that "[d]runk driving is an extremely dangerous crime." 553 U.S. at 141. In adopting an interpretation narrower than what the text of the residual clause might call for, *see id.* at 155 (Alito, J., dissenting), the Court homed in on the fifteen-year mandatory minimum. *See id.* at 145-46 (majority opinion) ("We have no reason to believe that Congress intended a 15-year mandatory prison

term" to be triggered by predicates that did not involve "purposeful, violent, and aggressive conduct"); *see also id.* ("Were we to read the statute without this distinction, its 15-year mandatory minimum sentence would apply to a host of crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'").

In sum, the Court has consistently recognized that the consequences of mandatory minimum sentences are significant enough to trigger constitutional protection. And that protection is all the more important where, as here, the increase in sentence is severe. The Court should be especially vigilant of the due process guarantee against vague statutes where the stakes of applying an unclear law are so high.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be reversed on the ground that ACCA's residual clause, *see* 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague.

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APPENDIX

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NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving federal sentence enhancements. In furtherance of this and its other objectives, NACDL files approximately fifty *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

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